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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 333

HARTFORD ACCIDENT & INDEMNITY COMPANY,
APPELLANT,

vs.

O. L. BUNN, DOING BUSINESS AS BUNN ELECTRIC COMPANY, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

FILED AUGUST 29, 1931

(36,147)

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[fol. 1] [Caption omitted]

[fol. 2]

IN CHANCERY COURT OF ADAMS COUNTY, MISSISSIPPI, TO DECEMBER RULES, 1927

Cause #—, Box #—

NATCHEZ INVESTMENT COMPANY, INC., Complainant,

vs.

J. V. & R. T. BURKES, T. J. BARTLETTE, Trustee in Bankruptcy for J. V. & R. T. Burkes; Hartford Accident & Indemnity Company, et al., Defendants

BILL OF COMPLAINT—Filed Oct. 24, 1927

To the Honorable Chancery Court of Adams County, Mississippi:

Now comes your complainant Natchez Investment Company, Inc., a corporation, qualified to do business in the State of Mississippi and having its principal place of business at Natchez, Mississippi, and brings this its suit against J. V. Burkes and R. T. Burkes, composing the copartnership of J. V. & R. T. Burkes of New Orleans, Louisiana, and whose Post Office address is New Orleans Bank Building, New Orleans, Louisiana, and against T. J. Bartlette, Trustee in Bankruptcy for the Bankrupt partnership of J. V. & R. T. Burkes, and Trustee for the individuals in Bankruptcy, J. V. Burkes and R. T. Burkes, appointed by the United States District Court for the Eastern District of Louisiana in Cause #3355 on the Docket of Edward J. Thilberger, Referee in Bankruptcy in New Orleans, Louisiana, and which Trustee's Post Office address is New Orleans Credit Men's Association, New Orleans, Louisiana; also Hartford Accident & Indemnity Company of Hartford, Connecticut, whose Post Office address is Hartford, Connecticut; and also R. Lee Parker, Jr., of Natchez, Mississippi; R. Scudamore, Jr. of Natchez, Mississippi; Natchez Brick Company, a partnership composed of R. Lee Parker, Jr., and R. Hicks

Parker, both of Natchez, Mississippi; Williamson-Greer, [fol. 3] a partnership composed of Walter Williamson and A. A. Greer, both of Dallas, Texas; Acme Engineering Company of Memphis, Tennessee; New Orleans Bank & Trust Company of New Orleans, Louisiana; Feltus Brothers Hardware Company of Natchez, Mississippi; Enochs Lumber Mfg. Company, a corporation of Jackson, Mississippi, domiciled at Jackson, Mississippi; the Capitol Paint & Glass Company, a corporation domiciled at Jackson, Mississippi; the Southern G-F Company, Inc., of Atlanta, Georgia; Chamberlain Metal Weather Strip Company, a corporation of St. Louis, Missouri; Hockaday, Inc., of Chicago, Illinois; National Show Case Company, of Columbus, Georgia; O. L. Bunn, doing business as Bunn Electric Company of New Orleans, Louisiana; Gibbens & Gordon, Inc., of New Orleans, Louisiana; Truscon Steel Company of Youngstown, Ohio; Woodward, Wight & Company, Ltd., of New Orleans, Louisiana; Schultz Cabinet Works of New Orleans, Louisiana; Natchez Drug Company of Natchez, Mississippi; Geisenberger Brothers Drug Company of Natchez, Mississippi; M. P. Phelan of Natchez, Mississippi and W. A. Jacobie Company of Dallas, Texas; and shows unto the Court the following facts in support of this petition:

(1)

That the Post Office address of the above named defendants as given is the Post Office address known to complainant after diligent search and inquiry, and that if there is any particular street address in connection with any of the above named defendants same cannot be ascertained after diligent search and inquiry.

(2)

That under date of October 18th, 1926 your complainant, Natchez Investment Company, Inc., entered into a certain agreement or contract with J. V. & R. T. Burkes of New Orleans, Louisiana for the construction of a certain building at Natchez, Mississippi, known as Project #640 on [fol. 4] the files of Weiss & Dreyfus, Inc., Architects at New Orleans, Louisiana, a copy of which contract or agreement is filed herewith and made a part hereof and marked

Exhibit "A". That said contract and agreement #640 has as a part thereof certain specifications compiled by the Architects and referred to in said contract and made a part thereof and a copy of said specifications is filed herewith and made a part hereof and marked Exhibit "B" hereto.

That said specifications contain one hundred twenty-six (126) numbered pages, numbered from #1 to #126, inclusive, and also contains three (3) pages preceding page #1, and all are bound in binder marked "Plans #640—Specifications for the Eola Hotel, a Seven Story Fire Proof Building to be erected in Natchez, Mississippi" and of said specifications on pages 18 and 19 thereof appears the following Clauses:

"Article 30

It shall be the obligation of every contractor and sub contractor estimating upon work under this contract operation to figure and to include within his bid to furnish a bond in the sum and conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the Owner or Architects; contractor likewise to pay the costs of any required recordation of contract and bond and the cost of any required cancellation of the came. He shall also secure and pay for Lien Privilege Certificate which will be required of him before final payment is made under this contract.

The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the Owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become neces- [fol. 5] sary.

Guarantee.—It is the intent of the Architects to secure first class, permanent material and construction, and to this end each contractor will be held responsible for and must rectify all defects discovered in his work within one year after completion of the entire structure and its ac-

ceptance by the Architect. Should any material or workmanship called for by these specifications, be of such a nature as to render this guarantee impossible, notice of this effect must be served in writing upon the Architects previous to the signature of contract; failure to do so will be construed as tacit agreement to the strictest terms of this guarantee.

Obligations of Bondsmen.—The contractor's bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contracts covering the work executed hereunder and the owner and the Architect reserve the right to make all desired changes, alterations, and additions under the conditions and in the manner hereinbefore described, without any measure affecting the liability of the bondsmen or releasing them from any of their obligations hereunder. The Owner and the Architect reserve the right to make such changes, alterations and additions in the manner specified without notice to the contractor's surety, and waiver of such notice shall not affect the validity of the bond.

The sureties for the various contractors shall be, and are hereby declared and acknowledge themselves to be, bound to the Owner as guarantors, separately and in solido with the contractors of the fulfilment of the terms of the foregoing."

(3)

That on October 20th, 1926, the said J. V. & R. T. Burkes, in compliance with said contract and the foregoing quoted [fol. 6] provisions of the contract and specifications to furnish a bond to secure the Owner the faithful performance of the contract did furnish such a bond with Hartford Accident & Indemnity Company of Hartford, Connecticut as surety thereon.

A copy of said bond is filed herewith as Exhibit "C" and made a part hereof, the same as though fully incorporated herein, and the said bond among other provisions made the said Contract, Exhibit "A", and the said Specifications, Exhibit "B", parts of said bond; the said bond containing among other clauses the following:

"Whereas, the Principal and the Obligee have entered into a certain written contract (hereinafter called the con-

tract) dated October 18th, 1926 to construct "Eola Hotel" Building as per plans and specifications #640 as prepared by Weiss & Dreyfus, Architects, New Orleans, Louisiana, a copy of which is or may be attached hereto, and is hereby referred to and made a part hereof."

(4)

That the said J. V. & R. T. Burkes proceeded to construct the said Eola Hotel under the said contract and specifications and the Natchez Investment Company, Inc. accepted the said Hotel under an agreement dated August 20th, 1927, by which the said J. V. & R. T. Burkes agreed, that notwithstanding the acceptance of the said Hotel by complainant, that should the Architects later determine that any work done in connection with the Hotel had been faulty or improperly done, or neglected, that then the said contractors, J. V. & R. T. Burkes, would be held and bound to construct, correct and supply such work, labor and material as might be determined by the Architects to be furnished, constructed, corrected or supplied on said Hotel job, and a copy of said contract is filed herewith, marked Exhibit "D" and made a part hereof for all purposes.

[fol. 7] That payments were made to the said contractors for all sums owing on the same as agreed between the said contractors and complainant, except for the sum of Four Thousand One Hundred Twenty-Two ($4,122.00) Dollars, which amount is in the hands of the Canal Bank & Trust Company of New Orleans, Louisiana, Trustee for the disbursement of the building fund that had been provided by a First Mortgage Bond Issue for the building of said Hotel. That before the disbursement of said $4,122.00 to the said J. V. & R. T. Burkes, your complainant received written notices from various persons who had supplied material to the said contractors in the building of the Eola Hotel, stating that they had not been paid, for the material furnished, and complainant here offers to have said Trustee pay said amount into Court. That said parties so furnishing said notices to complainant were the following:

R. Lee Parker, Jr., of Natchez, Mississippi.
R. Scudamore, Jr., of Natchez, Mississippi.
Natchez Brick Company of Natchez, Mississippi.
Williamson-Greer Company of Dallas, Texas.

Acme Engineering Company of Memphis, Tennessee.
Feltus Brothers Hardware Company of Natchez, Mississippi.
Enochs Lumber & Mfg. Company of Jackson, Mississippi.
The Capitol Paint & Glass Company of Jackson, Miss.
The Southern G-F Company of Atlanta, Georgia.
Chamberlain Metal Weather Strip Co., St. Louis, Mo.
Hockaday, Inc. of Chicago, Illinois.
National Show Case Company of Columbus, Georgia.
O. L. Bunn, doing business as Bunn Electric Company of New Orleans, Louisiana.
Gibbens & Gordon, Inc., of New Orleans, Louisiana.
Truscon Steel Company of Youngstown, Ohio.
Woodward, Wight & Company, Ltd., of New Orleans, La.
[fol. 8] Schultz Cabinet Works of New Orleans, La.
Natchez Drug Company of Natchez, Miss.
M. P. Phelan of Natchez, Miss.
W. A. Jacobie Company of Dallas, Texas.

And the amount of said claims aggregated the sum of Sixty-Two Thousand Seventy-Three Dollars and Twenty-Nine Cents ($62,073.29). That thereupon the said $4,122.00, balance owing the said J. V. & R. T. Burkes out of the construction fund, was not paid over, but still remains in the hands of the Trustee. That complainant also received notice that New Orleans Bank & Trust Company had been assigned by J. V. & R. T. Burkes part of the claim of J. V. & R. T. Burkes against complainant in connection with the construction of the said Hotel in the amount of $26,323.00, and the said J. V. & R. T. Burkes and New Orleans Bank & Trust Company had brought suit in the Circuit Court of Adams County, Mississippi, numbered $1305 on the Docket of the Circuit Court of Adams County, Mississippi, claiming the said balance to be owing on the building of the Eola Hotel and that said balance has been assigned to New Orleans Bank & Trust Company and complainant denies owing said balance on said contract.

(5)

That under the agreement, Exhibit "D" hereto, the said contractors are liable to correct improper work and faulty work done in connection with the said Eola Hotel to an amount estimated to be the value of Six Thousand ($6,000.00) Dollars.

(6)

That among the parties above mentioned as having given notice to complainant of claims against said contractors which have not been paid, is O. L. Bunn, doing business as Bunn Electric Company, who has brought suit in the Circuit Court of Adams County, Mississippi, same being num-
[fol. 9] bered #— on the Docket thereof for the sum of $— against the said contractors and your said complainant for amounts owing by the said contractors J. V. & R. T. Burkes and unpaid by them.

(7)

That Hartford Accident & Indemnity Company, one of the defendants herein has been notified that under its bond it is liable for all sums owing by the said contractors, J. V. & R. T. Burkes, in connection with the building of the Eola Hotel and has denied its liability on its said bond, claiming that its said bond is not a bond that guarantees the faithful performance of the contract, but is a bond of indemnity.

(8)

That Section 2, Chapter 128 of the Laws of 1918 for the State of Mississippi, Hemingway's Code of 1927, Section 2587 denies to any contractor the right to assign, transfer or dispose of in any way the contract or the proceeds thereof to the detriment or prejudice of subcontractors, journeymen, laborers and materialmen as declared in said Act and provided that all such assignments, transfers or disposition shall be subordinate to the rights of subcontractors, journeymen, laborers and materialmen as well as the owner. That should it be held and determined that the bond furnished by the contractor to the complainant in this case is not a bond for the faithful performance of the said contract, project No. 640, then in such case any assignment made by the said J. V. & R. T. Burkes to New Orleans Bank & Trust Company of the proceeds of said contract would be subordinate to the rights and claims of the subcontractors and materialmen mentioned herein, and to whom the said J. V. & R. T. Burkes owe money for material furnished in the construction of the Eola Hotel.

[fol. 10] (9)

That under said contract, specifications and bond and under the Law your complainant is entitled to bring suit against said contractors and said surety on said bond and to bring in all subcontractors and materialmen having claims for material furnished in the building of said Eola Hotel, and for which material they have not been paid by the said contractors, and is entitled to have it ascertained and determined whether or not the said bond given in connection with said contract and specifications is a bond for the faithful performance of said contract or simply a bond of indim-ity.

(11)

Complainant shows that by reason of receiving of notices as hereinabove set forth of nonpayment by said contractors or materialmen and by reason of the facts herein alleged complainant has incurred attorney's fees and that the specifications provide that the surety and bond shall be "liable for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary." That this proceeding is in the nature of a concursus proceeding and that this proceeding in necessary in order to adjudicate the rights and equities of all parties mentioned herein, and that, therefore, complainant is entitled to recover on said bond reasonable attorney's fees to be fixed and adjudicated by the Court, and complainant avers and charges should be adjudicated at the sum and amount of $5,000.00, and which amount complainant claims in this cause.

(12)

Complainant further avers and says that it is entitled to have and recover under said bond the amount and value of work necessary to be done and labor and material necessary to be furnished by said contractors to complete and maintain the said project #640 according to plans and specifications and which complainant avers is the sum of $15,000.00.

[fol. 11] (13)

Complainant further avers and charges that the parties herein named as furnishing material in connection with

said project #640 to said contractors have not been paid and are entitled to recover the amount owing to them by said contractor and to have judgment for said amount on said bond.

Premises considered, complainant prays that the said defendants above named all be summoned by proper process to the December Rules 1927 of this Honorable Court, there to plead, answer or demur to this bill and that upon a hearing of this Cause the Court a decree render adjudicating the said bonds on which Hartford Accident & Indemnity Company is surety to be bond for the faithful performance of the contract and subject to all the rights and liabilities provided by Chapter 128 Laws of 1918 State of Mississippi, and particularly Section 3 thereof, being Section 2598 Hemingway's Code for 1927 of the State of Mississippi, and render a judgment against the said contractors, the Trustee in Bankruptcy and said Hartford Accident & Indemnity Company for such sum as may be found to be necessary to complete and maintain the said project #640; also for reasonable attorney's fees for the bringing of this proceedings; also for the amounts owing to the sub-contractors and materialmen herein named and such other as may intervene in this proceeding as provided by Section 3, Chapter 128 Laws of the State of Mississippi, Section 2598 Hemingway's Code of 1927 and which amounts aggregate the sum of $100,000.00; also this Court to determine and adjudicate what amount, if anything, this complainant should pay to New Orleans Bank & Trust Company under the alleged assignment of the proceeds of said project #640 and also adjudicate whether or not said amount, or anything, should be paid to the said New Orleans Bank & Trust Company or to the said Sub-contractors and materialmen.

[fol. 12] Further prays that if complainant has asked for wrong or insufficient relief that then the Court award herein such other, further, different and general relief as may be right and proper in the premises. And in duty bound complainant will ever pray.

Engle & Laub, Sols. for Complainant.

Duly sworn to by Leon M. Levy. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 13] EXHIBIT "A" TO BILL OF COMPLAINT

The Standard Form of Agreement Between Contractors and Owner for Construction of Buildings

Issued by the American Institute of Architects for use when a Stipulated sum forms the basis of Payment.

This form of agreement has received the approval of the National Association of Builders' Exchanges, the Associated General Contractors of America, the Joint conferences on Construction Contracts, the National Association of Master Plumbers, the National Association of Sheet Metal Contractors of the United States, The National Electrical Contractors' Association of the United States, the National Association of Marble Dealers, the Building Granite Quarries Association, and the Building Trade Employers' Association of the City of New York.—Fourth Edition, Copyright 1915-1916-1925 by the American Institute of Architects, the Octagon House, Washington, D. C. This form is to be used only with the Standard General Conditions of the contract for construction of buildings.

This agreement Made the 18th day of October, in the year Nineteen Hundred and Twenty-Six, by and between J. V. & R. T. Burkes of New Orleans, Louisiana, a copartnership composed of J. V. Burkes and R. T. Burkes, hereinafter called the Contractor and Natchez Investment Company, Inc., a corporation under the laws of the State of Louisiana, and domiciled in the Town of Vidalia in said State, with an office in the City of Natchez, Mississippi, and represented by Leon M. Levy President and M. O. Levy, Secty-Treas. hereinafter called the Owner.

[fol. 14] Witnesseth, that the Contractor and the Owner for the considerations hereinafter named agreed as follows:

Article 1. Scope of the Work.—The Contractor shall furnish all of the materials and perform all of the work shown on the Drawings and described in the Specifications numbered #640 in the Architect's files, subject

(Here insert the caption descriptive of the work as used on the Drawings and in the other Contract Documents.)

to amendments, alterations, eliminations and changes as set forth in bulletins hereto attached, forming a part hereof,

identified by the initials of the parties hereto for reference. Prepared by Weiss and Dreyfus, Inc., Architects, acting as and in these Contract Documents entitled the Architects and shall do everything required by this Agreement, the General Conditions of the Contract, the specifications and the Drawings.

Fourth edition, 1925, Page 1.

Article 2. Time of Completion.—The work to be performed under this Contract shall be commenced at once and shall be substantially completed May 10th, 1927.

(Here insert stipulation as to liquidated damages, if any.)

It being understood, however, that no damages nor penalties of any sort are to be assessed against contractors for non-completion within the time above specified, unless contractors fail to furnish material and workmanship at a rate of progress and in a manner satisfactory to the architects.

Article 3. The Contract Sum.—The Owner shall pay the Contractor for the performance of the Contract, subject to additions and deductions provided therein, in current funds [fol. 15] as follows $316,822.00. (State here the lump sum amount, unit prices, or both, as desired in individual cases.)

Where the Quantities originally contemplated are so charged that the application of the agreed unit price to the quality of work performed is shown to create a hardship to the Owner or the Contractor, there shall be an equitable adjustment of the contract to prevent such hardship.

Fourth edition, 1925, page 2.

Article 4. Progress Payments.—The Owner shall make payments on account of the Contract as provided therein, as follows: On or about the 1st and 15th day of each month the value, based on the Contract prices, of Labor and materials incorporated in the work and of materials suitably stored at the site thereof up to the 1st and 15th day of each month, as estimated by the Architects less the aggregate of previous payments: Price —.

(Insert here any provision made for limiting or reducing the amount retained after the work reaches a certain stage of completion.)

Article 5. Acceptance and Final Payment.—Final payment shall be due upon substantial completion of the work provided the work be then fully completed and the Contract fully performed. Upon receipt of written notice that the work is ready for final inspection and acceptance, the Architect shall promptly make such inspection, and when he finds the work acceptance under the Contract and the Contract fully performed he shall promptly issue a final certificate, over his own signature, stating that the work pro- [fol. 16] vided for in this Contract has been completed and is accepted by him under the terms and conditions thereof, and that the entire balance found to be due the Contractor, and noted in said final certificate, is due and payable.

Before issuance of final certificate the Contractor shall submit Evidence satisfactory to the Architect that all payrolls, material bills, and other indebtedness connected with the work have been paid. If after the work has been substantially completed, full completion thereof is materially delayed through no fault of the Contractor, and the Architect so certifies, the Owner shall, upon certificate of the Architect, and without terminating the Contract, make payment of the balance due for that portion of the work fully completed and accepted. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

Fourth edition, 1925, page 3.

Article 6. The Contract Documents.—The General Conditions of the Contract, the Specifications and the Drawings, together with this Agreement, form the Contract, and they are as fully a part of the Contract as if hereto or herein repeated.

The following is an enumeration of the Specifications and Drawings: 25 sheets of general drawings and details numbered No. 1 to No. 23, inclusive, and general mechanical and electrical equipment specifications consisting of 126 mimeographed pages, identified by initials of the parties hereto.

Fourth edition, 1925, page 4.

[fol. 17] In witness whereof the parties hereto have executed this agreement the day and year first above written.

J. V. & R. T. Burkes, by R. T. Burkes. Natchez Investment Company, Inc., by Leon M. Levy, Pres.; by Maurice O. Levy, Sec. & Treas. (Seal.)

Witnesses: E. O. Spencer, S. B. Laub.

Fourth edition, 1925, page 5.

[File endorsement omitted.]

[fol. 18] Plan 640, Bulletin No. 1

New Orleans, September 30, 1926.

General contractor shall include within his contract the following work:

Hardwood Floor (on Seventh Floor).—General contractor shall furnish and lay over Nailcode a 7/8" x 2", Select Grade, plain sawn, Indian Red Oak Floor: material to be side and end matched, blind nailed, tightly driven, machine finished smooth and even, carefully sanded, filled with a dark stain and filler, given two coats of shellac or approved spar varnish, waxed and polished with Johnson's floor wax using weighted brush.

Weiss & Dreyfus, Inc.

[fol. 19] Plan 640

Interior

It is the declared and acknowledged intention to erect a brick and concrete, Hotel Building, to occupy a site of ground, all shaped, with Frantages on Pearl and on Main streets in the City of Natchez, Mississippi, in accordance with these specifications, and with plans #640 to which they refer.

[fol. 20] Plan 640

Contracts

The contracts to cover the work done will be based on these specifications, and on the plans to which they refer, which will be attached hereto and form a part hereof.

[fol. 21] EXHIBIT "B"

Excerpts from Specifications

(a) The Contract Documents consist of the Agreements, the General Conditions of the Contract, the Drawings and Specifications, including all modifications thereof incorporated in the documents before their execution. These form the Contract.

(e) The term "Work" of the Contractor or Subcontractor includes labor or materials or both.

(g) The law of the place of building shall govern the construction of this Contract.

Art. 2. Execution, Correlation, and Intent of Documents.—The Contract Documents shall be signed in duplicate by the Owner and the Contractor. In case the Owner and the Contractor fail to sign the General Conditions, Drawings or Specifications, the Architect shall identify them. The Contract Documents are complementary and what is called for by one shall be as binding as if called for by all. The intention of the documents is to include all labor and materials, equipment and transportation necessary for the proper execution of the work. It is not intended, however, that materials or work not covered by or properly inferable from any heading, branch, class or trade of the specifications shall be supplied unless distinctly so noted on the drawings. Material or work described in words which so applied have a well known technical or trade meaning shall be held to refer to such recognized standards.

[fol. 22] Art. 9. Materials, Appliances, Employees.—Unless otherwise stipulated the Contractor shall provide and pay for all materials, labor, tools, equipment, light, power, transportation and other facilities necessary for the execution and completion of the work. Unless otherwise specified all materials shall be new and both workmanship and materials shall be of good quality. The contractor shall, if required, furnish saticfactory evidence as to the kind and quality of materials. The Contractor shall at all times enforce strict discipline and good order among his em-

ployees, and shall not employ on the work any unfit person or any one not skilled in the work assigned to him.

Art. 26. Payments Withheld.—The Architect may withhold or, on account of subsequently discovered evidence, nullify the whole or a part of any certificate to such extent as may be necessary to protect the Owner from loss on account of:

(a) Defective work not remedied.

(b) Claims filed or reasonable evidence indicating probable filing of claims.

(c) Failure of the Contractor to make payments properly to subcontractor or for material or labor,

(d) A reasonable doubt that the contract can be completed for the balance then unpaid.

(e) Damage to another Contractor.

When the above grounds are removed payment shall be made for amounts withheld because of them.

[fol. 23] Article 30. Guaranty Bond.—The Owner shall have the right, prior to the signing of the contract, to require the Contractor to furnish bond covering the faithful performance of the Contract and the payment of all obligations arising thereunder, in such form as the Owner may prescribe with such sureties as he may approve. If such bond is required by instructions given previous to the submission of bids, the premium shall be paid by the Contractor; if subsequent thereto it shall be paid by the Owner.

[fol. 24] Article 32. Liens.—Neither the final payment nor any part of the retained percentage shall become due until the Contractor, if required, shall deliver to the Owner a complete release of all liens arising out of this Contract, or receipts in full in lieu thereof, and, if required in either case, an affidavit that so far as he has knowledge or information the releases and receipts include all the labor and material for which a lien could be filed; but the Contractor may, if any subcontractor refuses to furnish a release or receipt in full, furnish a bond satisfactory to the Owner, to indemnify him against any lien. If any lien remain un-

satisfied after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging such a lien, including all costs and a reasonable attorney's fee.

Art. 33. Assignment.—Neither party to the Contract shall assign the contract or sublet it as a whole without the written consent of the other, nor shall the Contractor assign any moneys due or to become due to him hereunder, without the previous written consent of the Owner.

[fol. 25] The Contractor agrees—

(d) To be bound to the Subcontractor by all the obligations that the Owner assumes to the Contractor under the Agreement, General Conditions, Drawings and Specifications, and by all the provisions thereof affording remedies and redress to the Contractor from the Owner.

(e) To pay the Subcontractor, upon the issuance of certificates, if issued, under the schedule of values described in Article 24 of the General Conditions the amount allowed to the Contractor on account of the subcontractor's work to the extent of the subcontractor's interest therein.

(f) To pay the subcontractor, upon the issuance of certificates, if issued otherwise than as in (e) so that at all times his total payments shall be as large in proportion to the value of the work done by him as the total amount certified to the Contractor is to the value of the work done by him.

(g) To pay the subcontractor to such extent as may be provided by the Contract Documents or the subcontract, if either of these provides for earlier or larger payments than the above.

(h) To pay the subcontractor on demand for his work or materials as far as executed and fixed in place, less the retained percentage, at the time the certificate should issue, even though the Architect fails to issue it for any cause not the fault of the subcontractor.

[fol. 26] Article 30

It shall be the obligation of every contractor and subcontractor estimating upon work under this contract oper-

ation to figure and to include within his bid to furnish a bond in the sum and conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the Owner or Architect, contractor likewise to pay the cost of any required recordation of contract and bond and the cost of any required cancellation of the same. He shall also secure and pay for Lien and Privilege certificates which will be required of him before final payment is made under this contract. The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the Owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi and shall profect for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary.

Obligations of Bondsmen.—The Contractor's bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contracts covering the work executed hereunder, and the Owner and the Architect reserve the right to make all desired changes, alterations, and additions, under the conditions and in the manner hereinbefore described, without in any measure affecting the liability of the bondsmen or releasing them from any of their [fol. 27] obligations hereunder. The Owner and the Architect reserve the right to make such changes, alterations, and additions in the manner specified without notice to the Contractor's surety, and waiver of such notice shall not affect the validity of the bond. The sureties for the various contractors shall be and are hereby declared and acknowledge themselves to be, bound to the Owner as guarantors, separately and in solido with the Contractors of the fulfillment of the terms of the foregoing.

[fol. 27a] EXHIBIT "C" TO BILL OF COMPLAINT

Hartford Accident and Indemnity Company, Hartford, Connecticut

Know all men by these presents: That J. V. & R. T. Burkes, a co-partnership composed of J. V. and R. T.

Burkes, of New Orleans, La., of —— (hereinafter called the Principal) as principal and the Hartford Accident & Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut, of Hartford, Connecticut (hereinafter called the Surety) as surety, are held and firmly bound unto Natchez Investment Company, Inc., Natchez, Mississippi, of —— (hereinafter called the Obligee) in the sum of Three Hundred Sixteen Thousand Eight Hundred Twenty-two & no/100 ($316,822.00) Dollars, for the payment whereof the Obligee the Principal and the surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents. Signed, sealed and dated this 20th day of October, 1926, Whereas, the Principal and the Obligee have entered into a certain written contract (hereinafter called the contract) dated October 18th, 1926, To construct "Eola Hotel" building as per plans and specifications #640 as prepared by Weiss & Dreyfus, Architects, New Orleans, La., a copy of which is or may be attached hereto, and is hereby referred to and made a part hereof. Now, therefore, the condition of this obligation is such that if the principal shall indemnify the obligee against loss or damage directly caused by the failure of the principal faithfully to perform the contract, then this obligation shall be null and void; otherwise it shall remain in force; provided, however, this bond is executed by the sur-ty, upon the following express conditions, which shall be precedent to the right of recovery hereunder.

[fol. 27b] 1. The Obligee, shall, at the times and in the manner specified in the contract, fully comply with all the terms thereof, and if the obligee default in the performance of any matter or thing agreed or required in this bond, or in the contract, the surety shall thereupon be relieved of all liability hereunder.

2. If the principal shall in any manner default in the performance of any matter or thing specified in the contract, or if the principal shall abandon the work provided in the contract on the part of the Principal to be done, the obligee shall immediately so notify the surety and thereafter the surety shall have the right at its option to assume, or assume and sublet, the contract and to proceed thereunder as if no default or abandonment had occurred,

and in such event all moneys agreed in the contract to be paid the principal and which at the time of default or abandonment are unpaid the principal and which at the time of default or abandonment are unpaid by the obligee shall thereupon belong and become payable to the surety and shall be paid to it.

3. If at any time there come to the notice or knowledge of the obligee information that any claim for labor performed or for materi*sla* furnished the principal in or upon the work specified in the contract remains unpaid, or that any lien or notice of lien for such work or materials has been filed or served, the obligee shall withhold from the principal payment of any moneys due or to become due to the principal under the contract until the payment of such claim or discharge of such lien or notice of lien, and will so notify the surety, giving a statement of the particular facts and amount of each such claim lien or notice of lien.

4. If any changes or alterations by the principal or obligee shall be made in the plans or specifications for the work described in the contract, the obligee shall immediately notify the surety thereof, giving a description and stating the amount of money involved by such changes or altera-[fol. 27c] tions. Provided, however, that should the cost of such changes or alterations in the aggregate amount to a sum equal to 10% of the penal sum of this bond, no further changes, or alterations shall be made by the principal or obligee until the consent of the surety shall first be obtained thereto.

5. In the event of the destruction of or injury to the work specified in the cont*t*act by fire, by riot, mob, the elements, earthquake, cyclone, tornado, lightning, public enemy or any act of God or through so called strikes or labor difficulties the surety shall not be liable for any loss or damage whatsoever resulting therefrom.

6. This bond does not apply to nor cover guarantees of the work specified in the contract; nor of its efficiency; nor of the wearing qualities thereof; nor for maintenance of or repairs thereto hereinafter specifically agreed to as being covered by this bond; nor for the furnishing of any bond; nor to the payment of any damages or compensations either at common law or under any stat-

ute, Federal or State, arising from or growing out of injuries to persons or property; nor for failure to procure insurance or to comply with any statute covering such damages or compensation; nor the furnishing of any policy of insurance; nor for damages caused by delay in completing the work except such damages as have actually been sustained and proved.

7. The surety shall not be liable for the infringement of any patent or for the validity of any letters patent granted by the United States in connection with any article which is required by the Contract to be furnished by the principal; nor shall the surety be liable hereunder unless the consideration paid by the obligee to the principal for the performance of the contract shall be cash.

[fol. 27d] 8. None of the conditions or provisions contained in this bond shall be deemed waived or altered by the surety unless the written consent to such waiver or alteration be duly executed by its authorized officer and its seal be duly affixed thereto; nor shall the obligee consent to an assignment of the contract or any part thereof without the express consent of the surety duly executed and attested as aforesaid; nor shall this bond or any rights thereunder be assignable except with the consent of the surety duly executed and attested as aforesaid.

9. No action, suit or proceeding shall be had or maintained against the surety under this bond unless it shall be brought or instituted and process served upon the surety within six (6) months after the contract and in no event after six (6) months subsequent to the date, time or period fixed in the contract for the completion of the work specified, therein.

10. All notices and other evidence required by this bond to be furnished by the obligee to the surety shall be in writing and shall be forwarded by registered mail to the surety at its principal office in Hartford, Connecticut.

11. No right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the obligee named herein; and the obligation of the surety is and shall be construed strictly as one of suretyship only.

J. V. & R. T. Burkes, Principal, by —— ——. Hartford Accident and Indemnity Co., by E. O. Spencer, Attorney-in-fact.

Witness: —— ——, of individual.
Attest: —— ——, if Corporation.

Copy of Original.

[File endorsement omitted.]

[fol. 28] IN CHANCERY COURT OF ADAMS COUNTY

[Title omitted]

ANSWER AND CROSS-BILL

To the Honorable Chancery Court of Adams County Mississippi:

Now comes the Defendant, St. Bernard Cypress Company, Ltd., and for answer to the bill of complaint filed herein, or unto so much or such parts thereof as this Defendant is advised is material for him to make answer unto, he answers and says:

I

Defendant admits the allegations contained in paragraph #1 of said bill of complaint.

II

Defendant further admits that under date of October 18, 1927, the Complainant, Natchez Investment Company, Inc., entered into a contract with J. V. & R. T. Burkes, of New Orleans, Louisiana, for the construction of a certain building at Natchez, Mississippi, known as project #640 on the files of Weiss & Dreyfus, Inc., Architects, at New Orleans, Louisiana, a copy of which contract or agreement is filed with the original bill of complaint in this cause and is adopted and made a part of this answer, and prayed to be taken as a part hereof the same as though copied in full herein. Defendant further admits and herein charges and avers that said contract and agreement #640 has as a part thereof certain specifications compiled by the Architects and referred to in said contract and made a part thereof. A copy of said specifications having been filed as Exhibit

"B" with said original bill of complaint, is made a part hereof the same as though incorporated at length herein.

[fol. 29] III

Said Defendant further admits that said specifications contain one hundred and twenty six (126) numbered pages numbered from #1 to #126 inclusive, and also contain three (3) pages preceeding page #1 and are all bound in a binder marked "Plants #640 Specifications for the Eola Hotel, a seven story Fire Proof Building to be erected in Natchez, Mississippi," and of said specifications on pages 18 and 19 thereof appears the following clauses:

"Article 30

It shall be the obligation of every contractor and subcontractor estimating upon work under this contract operation to figure to include within his bid to furnish a bond in the sum and conditioned as the Law of the State of Mississippi requires, in a surety company satisfactory to the Owner or Architect; contractors likewise to pay the cost of any required recordation of contract and bond and the cost of any requited cancellation of the same. He shall also secure and pay for lien and Privilege certificate which will be required of him before final payment is made under this contract.

The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications; it shall protect the Owner against all liens or claims that may be filed against the building according to the Laws of the State of Mississippi, and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary.

Guarantee.—It is the intent of the Architects to secure first class permanent material and construction, and to this end each contractor will be held responsible for and must rectify all defects discovered in his work within one year after completion of the entire structure and its [fol. 30] acceptance by the Architects. Should any material or workmanship called for by these specifications, be of such a nature as to render this guarantee impossible, notice of this effect must be served in writing upon the

Architects previous to the signature of contractor; failure to do so will be construed as tacit agreement to the strictest terms of this guarantee.

Obligations of Bondsmen.—The contractor's bondsmen shall obligate themselves to all the terms and covenants of these specifications and of the contracts covering the work executed hereunder and the Owner and the Architects reserve the right to make all desired changes, alterations and additions, under the conditions and in the manner hereinbefore described, without in any measure affecting the liability of the bondsmen or releasing them from any of their obligations hereunder. The Owner and the Architect reserve the right to make such changes, alterations and additions in the manner specified without notice to the contractors surety, and waiver of such notice shall not effect the validity of the bond.

The surety for the various contractors shall be, and are hereby declared and acknowledge themselves to be bound to the Owner as guarantors, separately and in solido with the contractors of the fulfillment of the terms of the foregoing."

IV

Defendant further admits that on October 20, 1926, the said J. V. & R. T. Burkes, in compliance with said contract and the foregoing quoted provisions of the contract and specifications to furnish a bond to secure the Owner the faithful performance of the contract, did furnish such a bond with Hartford Accident & Indemnity Company of Hartford, Connecticut, as surety thereon. A copy of said bond having been filed as Exhibit "C", to said bill of complaint, and made a part thereof, is now also made a part hereof the same as though fully incorporated herein. And, said defendant further admits, charges and avers [fol. 31] that said bond among other provisions contained therein, made the said Contract, Exhibit "A", and the Specifications, Exhibit "B", parts of said bond; and incorporated the same in the terms, stipulations and conditions of said bond; the said bond containing among other clauses, the following:

"Whereas, the Principal and the Obligee have entered into a certain written contract (hereinafter called the con-

tract) dated October 18th, 1926 to construct "Eola Hotel" Building as per plans and specifications #640 as prepared by Weiss & Dreyfus, Architects, New Orleans, Louisiana, a copy of which is or may be attached hereto and is hereby referred to and made a part hereof."

V

Defendant further admits that the said J. V. and R. T. Burkes proceeded to construct the said Eola Hotel under said contract and specifications and that the Natchez Investment Company, Inc., accepted the said hotel, but this Defendant not being advised as to the terms of the agreement of August 10, 1927, referred to in paragraph #4 of said bill of complaint, neither admits nor denies that such an agreement was made and that the terms and effects thereof were as alleged in said bill of complaint. Defendant is informed and believes that certain payments were made to said contractors for certain sums owing to them under their contract with said complainant for the erection of said Eola Hotel, but this Defendant emphatically denies that payments were made to said contractors, the said J. V. & R. T. Burkes, for all sums owing under said contract and agreement referred to in paragraph #4 of said bill of complaint, except the sum of Four Thousand One Hundred and Twenty-Two ($4,122.00) Dollars, which said bill of complaint avers to be in the hands of the Canal Bank & Trust Company, of New Orleans, La., Trustee for the disbursement of the Building Fund, that was provided by a first Mortgage Bond Issue for the Building of said [fol. 32] Hotel, but this Defendant charges and avers upon information and belief that there is now in the hands of said Natchez Investment Company, Complainant, the sum and amount of Sixty Four Thousand Nine Hundred Eighty Eight Dollars, (#54,988.26) and Twenty-six cents, which is due and owing and unpaid by said Complainant to said J. V. & R. T. Burkes, and which is made up of certain independent indebtedness alleged and purported to have been assumed by the said Natchez Investment Company, for and on behalf of said Defendants, J. V. & R. T. Burkes, and which was by said Complainant, Natchez Investment Company, Inc., never been paid to said Defendants, J. V. & R. T. Burkes, nor any other person, but still an outstanding

indebtedness from said complainant to said last mentioned Defendants on their contract for the construction of said Eola Hotel Building, to-wit:

(1) Williamson-Greer Company, a partnership composed of Walter Williamson and A. A. Greer, of Dallas, Texas, in connection with the furnishing of material and work done in the construction of the Eola Hotel, and which indebtedness is in the sum of $12,815.10, and is represented by promissory note of the Natchez Investment Company, Inc.

(2) The indebtedness owing to Acme Engineering Company, of Memphis, Tennessee, a business of which A. W. Moore is the proprietor and which indebtedness is the sum of $14,805.96, and is represented by promissory note of Natchez Investment Company, Inc. The said note is held by Britton & Koontz National Bank, as collateral security.

(3) Indebtedness owing by J. V. & R. T. Burkes to R. Lee Parker Jr., in the sum of $1,829.70 for material furnished in connection with the construction of the Eola Hotel, and for which indebtedness said R. Lee Parker, Jr., holds claim against said contractors and this company.

[fol. 33] (4) The indebtedness owing to R. Scudamore, Jr., in the sum of $1,134.00 by said J. V. & R. T. Burkes for the furnishing of material used in the construction of the Eola Hotel, and for which indebtedness the said R. Scudamore Jr., holds a claim against said contractors and against this Company.

(5) The indebtedness owing to Natchez Brick Company, of Natchez, Mississippi, in the sum of $3,958.50 for the furnishing of material used in the construction of the Eola Hotel and for which claim the Natchez Brick Company holds against the said J. V. & R. T. Burkes, contractors, and against this company.

Total, $34,543.26;

Amount of notes favor of New Orleans Bank & Trust Company (assigned), $26,323.00,

added to which the sum of $4,122.00 admitted by Complainant in its bill of Complaint, to be in the hands of the Canal Bank & Trust Company, as a part of said Building Fund,

makes a total of $64,988.26, now owing by said Complainant to said J. V. and R. T. Burkes, and on which this Defendant has a lien to the amount of said indebtedness has a lien on said Eola Hotel Building. And, said Defendant admits that said Complainant received ~~written~~ notice from various persons who had supplied material to said contractors in the building of said Eola Hotel, stating that they had not been paid for the material furnished, and said Defendant avers that such notice was given through its attorney in the 24 day of October, 1927. Defendant admits that the name of the parties so furnishing said notices to Complainant were those names set out in Paragraph #4 of said bill of complaint, including also Geisenberger Bros. Drug Co., of Natchez, Mississippi, and St. Bernard Cypress Company, Ltd., whose names do not appear in the list of names [fol. 34] set out in said bill of complaint. Defendant not being advised as to the aggregate amount of said claim does not admit the same to be the sum of $62,073.29, as charged in said bill of Complaint, but demands strict proof thereof from said Complainant. Defendant further admits that Complainant received notice that there had been assigned to New Orleans Bank & Trust Company, by J. V. & R. T. Burkes, a part of the claim of said J. V. & R. T. Burkes, against complainant, in connection with the construction of said Eola Hotel, in the amount of $26,323.00 and that said J. V. & R. T. Burkes and New Orleans Bank & Trust Company have brought suit in the Circuit Court of Adams County, Mississippi, numbered #1305 on the Docket of said Court, claiming the said balance to be owing on the building of the Eola Hotel, and that said balance has been assigned to New Orleans Bank & Trust Company. But, this Defendant charges and avers that said assignment is subordinate to and effectual against all claims and demands of this Defendant.

VI

Defendant neither admitz nor denies the allegations contained in paragraph #5 of said bill of complaint, but demands strict proof thereof.

VII

Defendant admits the allegations contained in Paragraph #6 of said Bill of Complaint.

VIII

Defendant admits that Hartford Accident & Indemnity Company, one of the Defendants herein, has been notified that under its bond it is liable for all sums owing by said contractors, J. V. & R. T. Burkes, in connection with the building of said Eola Hotel, and that said Defendant has denied its liability on its said bond, claiming as it is alleged, that its said bond is not a bond that guarantees the faithful performance of said contract, but is a bond of indemnity.

[fol. 35] IX

Defendant further admits "That section 2, Chapter 128 of the Laws of 1917 for the State of Mississippi, Hemingway's Code 1927, Section 2597 denies to any contractor, the right to assign transfer or dispose of in any way the contract or the proceeds thereof to the detriment or prejudice of subcontractors, journeymen, laborer- and material men as declared in said Act and provides that all such assignments, transfers or dispositions shall be subordinate to the rights of subcontractors, journeymen, laborers and material men as well as the owner.

That should it be held and determined that the bond furnished by the contractor to the complainant in this case is not a bond for the faithful performance of the said contract, project #640, then in such case any assignment made by the said J. V. & R. T. Burkes to New Orleans Bank & Trust Company of the proceeds of said contract would be subordinate to the rights and claims of the subcontractors and mayerialmen mentioned herein, and to whom the said J. V. & R. T. Burkes owe money for material furnished in the construction of the Eola Hotel."

X

Said defendant further admits that under said contract, specifications and bond and under the Law, said Complainant is entitled to bring suit against said contractors and the surety on said bond, and to bring all subcontractors and material men having claims for material furnished in the building of said Eola Hotel, and for which material they have not been paid by said contractors, and is entitled to have it ascertained and determined whether or not the said bond given in connection with said contract and specifica-

tions is a bond for the faithful performance of said contract of simply a bond of indemnity, and this Defendant avers that he also has the same rights in the premises.

[fol. 36]

XII

Defendant admits all of the allegations contained in paragraph #11 of said bill of complaint, except however, that said Defendant neither admits nor denies that the attorneys fees to be fixed and adjudicated by the court should be adjudicated at the sum and amount of Five Thousand ($5,000.00) Dollars, but charges that the amount of same should be fixed by said Court at such price as the Court shall deem reasonable and proper.

XIII

Defendant neither admits nor denies that Complainant is entitled to have and recover under said bond the amount and value of work necessary to be furnished by the contractors to complete the said project #640 according to plans and specifications, and which complainant avers is the sum of Six Thousand ($6,000.00) Dollars.

XIV

Defendant further admits that the parties named in said bill of complaint and the additional names set out in paragraph #4 of this answer, who furnished material in connection with project #640 to said contractors, have not been paid, and are entitled to recover the amount owing them by said contractors, and to have judgment for said amount against said contractors and the surety on its bond.

Cross-bill

And this Defendant having made full answer to the bill of complaint, filed herein, makes his answer a cross bill reiterating and recharging all of the averments in said answer contained, for cause of complaint by way of cross bill herein against said complainant and all parties to said suit, and for cross bill of complaint, cross complainant respectfully shows unto the court the following, to-wit:

[fol. 37]

I

That he is a resident of Arabie Post Office, State of Louisiana, and that the names and addresses of the cross de-

fendants in this bill of complaint are as follows:— Natchez Investment Company, a corporation under the Laws of the State of Louisiana, qualified and doing business in the State of Mississippi, and having its principal place of business at Natchez, Mississippi; J. V. Burkes and R. T. Burkes, composing the partnership of J. V. & R. T. Burkes of New Orleans, Louisiana, whose postoffice address is New Orleans Bank Building, New Orleans, Louisiana; J. V. Bartlette, Trustee in Bankruptcy for the Bankrupt partnership of J. V. & R. T. Burkes, and Trustee for the individuals in bankruptcy, appointed by the United States District Court for the Eastern District of Louisiana, for cause #3355, on the Docmet of Edward J. Thilborger, Referee in Bankruptcy, New Orleans, Louisiana, said Trustee's postoffice address being New Orleans Credit Men's Association, New Orleans, Louisiana; Hartford Accident & Indemnity Company, of Hartford, Connecticut; whose postoffice address is Hartford Connecticut; R. Lee Parker Jr., of Natchez, Mississippi; R. Scudamore, Jr., of Natchez, Mississippi; Natchez Brick Company, a partnership composed of R. Lee Parker, Jr., and R. Hicks Parker, both of Natchez, Mississippi; Williamson-Greer, a partnership composed of Walter Williamson and A. A. Greer, both of Dallas, Texas; Acme Engineering Company, of Memphis, Tennessee; New Orleans Bank & Trust Company, of New Orleans, Louisiana; Feltus Bros., Hardware Company of Natchez, Mississippi; Enochs Lumber & Mfg. Company, a corporation of Jackson, Mississippi, domiciled at Jackson, Mississippi; the Capital Paint & Glass Company, a corporation domiciled at Jackson, Mississippi; The Southern C. F., Inc., of Atlanta, Georgia; Chamberlain Metal Weather Strip [fol. 38] Company, a corporation of St. Louis, Missouri; Hockaday, Inc., of Chicago, Illinois; National Show Case Company of Columbus, Georgia; O. L. Bunn, doing business as Bunn Electric Company, of New Orleans, Louisiana; Gibbons & Gordon, Inc., of New Orleans, Louisiana; Truston Steel Company, of Youngstown, Ohio; Woodward Wight Company, Ltd., New Orleans, Louisiana; Schultz Cabinet Works of New Orleans, Louisiana; Natchez Drug Company, of Natchez, Mississippi; Geisenberger Bros. Drug Company, of Natchez, Mississippi; M. P. Phelan, of Natchez, Mississippi, and St. Bernard Cypress Co., Ltd., of Arabi, Louisiana.

II

That under date of October 18, 1926, said Defendants, J. V. & R. T. Burkes, entered into a certain contract and agreement with the Defendant, Natchez Investment Company, Inc., for the construction of said Eola Hotel Building, at Natchez, Mississippi, as alleged in said bill of complaint, and the answer of this cross-complainant as Defendant in this cause, which contract was designated and known as Project #640 on the files of Weiss & Dreyfus Inc., Architects at New Orleans, Louisiana, a copy of which contract has been filed herewith and made a part hereof, together with the specifications compiled by the Architects and referred to in said contract and made a part thereof, also filed herewith as an exhibit to the foregoing answer and is also made a part of this cross-bill.

III

That in compliance with the terms of said contract and said specifications, said Defendants, J. V. & R. T. Burkes entered into a bond with the said cross-defendant, Natchez Investment Company, Inc., and under the terms and stipulations and conditions of the specifications made a part of said contract and the bond with Hartford Accident & Indemnity Company, as surety, in compliance there- [fol. 39] with, proceeded to construct and did construct said Eola Hotel and name was accepted by the Natchez Investment Company on or about August 10, 1927. That cross-complainant at the special instance and request of said Defendant, J. V. & R. T. Burkes, furnished and delivered unto them labor and material during the time of their construction of said Eola Hotel, as the contractors therefor, on the dates and in the amounts shown on the itemized accounts hereto attached, and marked Exhibit "A" to this cross-bill and made a part thereof the same as though copied in full herein. That as shown by said itemized statement there is due to cross complainant by said Defendants, J. V. & R. T. Burkes and the Hartford Accident & Indemnity Company, as surety, on the bond aforesaid, the sum of Two Hundred Eighty Four Dollars, all of which is now due, owing and unpaid from said last named Defendants to cross-complainant. That all of said

labor and material so furnished to said J. V. & R. T. Burkes was used by them in the erection and construction of said Eola Hotel Building. That on the 24 day of October, 1927, cross complainant gave notice to said Natchez Investment Company, Inc., and the Eola Hotel Company, that they had furnished said labor and material and that the amount due therefor was unpaid. Said notice having been given in conformity with Hemingway's Code, 1927, Section 2596 (Laws 1918, ch. 128).

V

Cross-complainant further charges and avers that the bond executed by the Defendants, J. V. & R. T. Burkes, with the Hartford Accident & Indemnity Company, as surety thereon, was given in compliance as hereinabove alleged, with the contract and specifications for the construction of said Eola Hotel, and in compliance and conformity with Section 2598, Hemingway's Code 1927 (Sec. — Laws 1918, Ch. 128). That under the terms and conditions of said contract, specifications and bond, hereinabove mentioned, [fol. 40] and under the laws of the State of Mississippi, the said Defendants, J. V. & R. T. Burkes, became obligated to promptly pay to cross complainant the amounts of said Eola Hotel. And, upon default in the payment thereof, by said Defendants, J. V. & R. T. Burkes, the said Defendant, Hartford Accident & Indemnity Company became then and there obligated to said cross complainant to pay unto him all sums due and unpaid to him by said J. V. & R. T. Burkes, for labor and material furnished for the erection and const uction of said Eola Hotel. And cross complainant further charges that default has been made by said J. V. & R. T. Burkes in the payment to cross complainant for labor and material furnished as shown by the itemized accounts hereto attached, to the sum and amount of Two Hundred Eighty Four Dollars, for the payment of which the Defendant, Hartford Accident & Indemnity Company, is bound, obligated and liable to cross-complainant; and that there is now due, owing and unpaid to said cross complainant by said Defendant, Hartford Accident & Indemnity Company, the sum of Two Hundred Eighty Four Dollars, for which cross complainant is entitled to a judgment and decree.

VI

Cross complainant further charges and avers that the Defendant, Hartford Accident & Indemnity Company, has denied its liability on the aforementioned bond, claiming that said bond is not a bond that guarantees the faithful performance of the contract between said J. V. & R. T. Burkes, and the Natchez Investment Company, Inc., but is a bond of indemnity on which said Defendant, Hartford Accident & Indemnity Company is not liable. But, yet denying this contention of said last named Defendant and again charging it to be liable upon its bond aforesaid, in the full penalty thereof, cross complainant further charges:

[fol. 41]

VII

That said Defendants, J. V. & R. T. Burkes, have made an assignment to New Orleans Bank & Trust Company of a part of the claim and amount due said J. V. & R. T. Burkes, by said Natchez Investment Company, Inc., for the construction of said Eola Hotel in the sum and amount of Twenty Six Thousand Three Hundred Twenty Three ($26,323.00) Dollars, which cross complainant is advised and believes and charge is in the form of a note, or notes for said amount, executed by said Natchez Investment Company, Inc., and payable to said Defendants, J. V. & R. T. Burkes, or to the New Orleans Bank & Trust Company. And, Cross complainant further charges and avers that should it be held and determined by the Court that the bond given by said J. V. & R. T. Burkes, with the Hartford Accident & Indemnity Company, as surety, is not a bond guaranteeing the faithful performance of said contract as contemplated by Section 3, Chapter 128 of the Laws of 1918, but is a bond only of indemnity, then cross complainant charges that by virtue of Section 2, Chapter 128 of the Laws of 1918, said J. V. & R. T. Burkes were without right to assign, transfer or otherwise dispose of, in any way, the contract for the construction of said Eola Hotel, or the proceeds thereof, to the detriment or prejudice of cross complainant, or any other subcontractors, journeymen, laborers, and materialmen, and that such assignment is subordinate to the rights and lien of cross-complainant. And, cross complainant charges and avers that said assignment by said J. V. & R. T. Burkes to said

New Orleans Bank & Trust Company is greatly to the detriment and prejudice of cross complainant, and as above charges, is subordinate to all claims and liens held by this cross complainant against said J. V. & R. T. Burkes, and the proceeds due them for the construction of said Eola Hotel. And, cross complainant further charges and avers that in event this Court shall hold said [fol. 42] bond to be a bond only of indemnity, then cross complainant is entitled to have a lien declared in its favor for the proportionate amount of its claim against said Eola Hotel Building superior to all mortgages, deeds of trust and bond issues thereon, and against the said sum of Twenty Six Thousand Three Hundred Twenty Three ($26,323.00) Dollars, with interest thereon at the rate of 6% per annum from the date of said assignment, and is entitled further to a decree of this Court adjudicating said assignment to be subordinate to the claims of cross complainant, and to a decree and judgment against said New Orleans Bank & Trust Company for the full amount of said assignment, with interest as aforesaid.

VIII

Cross Complainant further shows that said cross defendant, Natchez Investment Company, made, executed and delivered to S. B. Laub, Trustee, a deed of trust purporting to secure a bond issue amounting to the principal sum of Thirty Thousand ($30,000.00) Dollars, which deed of trust is not dated but was filed for record in the office of the Clerk of the Chancery Court of Adams County, Mississippi, on March 21st, 1927, and is recorded in Book 14, page 478 of the Records of Mortgages and Deeds of Trusts on lands in Adams County, Mississippi, and that this deed of trust purports to be a second mortgage upon the Eola Hotel Investment Building and premises and other properties of the Natchez Investment Company, Inc., being second and subordinate of record to a prior bond mortgage dated October 21, 1927, and recorded in Book 14, page 155 of said Deed of Trusts Records, securing an issue of serial bonds in the aggregate principal sum of Three Hundred Five Thousand Dollars. And cross complainant further shows that by instrument of writing dated July 23,

1927, recorded in Book 15, page 140 of said Records of Mortgages on Lands, said Natchez Investment Company, Inc., made, executed and delivered to Alvin Laub, Trustee, and to J. V. & R. T. Burkes, et al c. q. t., a certain alleged [fol. 43] deed of trust purporting to secure various customers of the Natchez Investment Company, Inc., of their alleged accounts against the Natchez Investment Company, by a deed of trust upon said Eola Hotel Building and premises, and other properties of said Natchez Investment Company, and which purports to be a third mortgage upon said property.

IX

And cross complainant now charges and avers that the purported deed of trust or mortgage from the Natchez Investment Company, Inc., to S. B. Laub, Trustee, bearing no date but which was acknowledged March 18, 1927, and is recorded in Book 14, page 478 of said mortgage Records, being the same hereinabove referred to and purporting to secure and issue of serial bonds in the aggregate principal sum of Thirty Thousand ($30,000.00) Dollars, is a false and fraudulent conveyance made without consideration inuring to said Natchez Investment Company, Inc., and the same was made with the design and intent to hinder and defraud the creditors of the said Natchez Investment Company, Inc., and that this cross complainant is entitled to have the same annulled and avoided.

X

And this cross complainant further charges and avers that that certain deed of trust made and executed by said Natchez Investment Company, Inc., to Alvin Laub, Trustee, and J. V. & R. T. Burkes, et al c. q. t., under date of July 23, 1927, and recorded in Book 15, page 140 of said Mortgage Records above referred to, is a false and fraudulent conveyance of the property therein attempted to be conveyed as security to the several claimants therein named, and that the same was prepared, drawn, executed and placed on record by the said Natchez Investment Company, [fol. 44] Inc., without the knowledge, consent or approval of any of the beneficiaries named therein, including this cross complainant, and that the same was made, executed and placed of record without any valuable consideration

inuring to said Natchez Investment Company, Inc., and that the same is so drawn and contained such provisions instead of protecting and securing the rights of the creditors named therein, as beneficiaries, the same in truth and in fact, is a subterfuge designed for the protection of said Natchez Investment Company, Inc., and designed, executed and recorded for the purpose of hindering and delaying the creditors of the Natchez Investment Company, Inc., and for the purpose of wrongfully depriving certain of the creditors of said Natchez Investment Company, Inc., of their just rights and remedies in enforcing their claims against said Natchez Investment Company, Inc., and that the same reserves to the Natchez Investment Company, Inc., an advantage inconsistent with its avowed purpose by attempting to deprive certain creditors of said Natchez Investment Company, Inc., of their rights to enforce collection of their claims against said Natchez Investment Company, Inc., and by further placing full power for the enforcement of the lien purported to be created by said deed of trust in the discretion and option of the Trustee therein named, by the Natchez Investment Company, Inc., and this cross complainant charges and avers that it is entitled to have the same annulled and avoided; cross complainant further avers that it is advised by the Natchez Investment Company, Inc., by L. Levy, Joseph Levy, M. O. Levy and Leon Levy and S. B. Laub, as to who, if anyone, holds bonds purporting to have been issued and secured by said deed of trust in favor of S. B. Laub, as Trustee, recorded in Book 14, page 478 of the Mortgage Records of Adams County, Mississippi, above mentioned and for the purpose of obtaining said information of said cross defendants, this cross complainant prays discovery of them [fol. 45] as to these facts and further for what purposes said bonds were issued and for what consideration, if any.

XI

Cross Complainant here again reiterated and recharges all of the allegations contained in paragraph # 5 of its foregoing answer, made a part of this cross bill. And, now charges and avers that said Natchez Investment Company, Inc., is indebted to said Defendants, J. V. & R. T. Burkes, in the sum of Sixty Four Thousand Nine Hundred and Eighty Eight Dollars and Twenty Six Cents ($64,988.26),

which is made up of various alleged indebtedness of said J. V. & R. T. Burkes to the persons, firms and corporations mentioned in paragraph # 5 of said answer and which said Natchez Investment Company, Inc., illegally assumed to the prejudice and detriment of this Cross complainant to the prejudice of those parties to whom said indebtedness is alleged to be owing, and cross complainant further charges and avers that the sum last above mentioned has never been paid to said Defendant-, J. V. & R. T. Burkes, nor to any other person by said Natchez Investment Company, but is at this moment an outstanding indebtedness from said complainant to said Defendants, J. B. & R. T. Burkes, on their contract for the construction of said Eola Hotel Building, and cross complainant charges and avers that it is entitled to a lien against said sum of Sixty Four Thousand Nine Hundred and Eighty Eight Dollars and Twenty Six Cents ($64,988.26), in the hands of the Natchez Investment Company, Inc., and against said Eola Hotel Building, to the extent of its proportionate share of said sum.

XII

The premises considered, cross complainant prays that all parties made Defendants to this cross bill be cited by [fol. 46] proper *per* process of this Honorable Court, to be and appear at the January, 1928, Term hereof, then and there to plead, answer or demur to this cross bill, answer under oath being waived, except as to Paragraphs VIII, IX and X of said cross bill wherein a discovery is sought from said Defendant, Natchez Investment Company, Inc., and that upon the hearing of this cause, may it please the Court to grant unto cross complainant a personal judgment and decree against defendants, J. V. & R. T. Burkes, and the Trustee in Bankruptcy, and the defendant, Hartford Accident & Indemnity Company, in the full sum*s* of Two Hundred Eighty Four Dollars. And that this Honorable Court will render a decree against the Natchez Investment Company, Inc., in favor of cross complainant for its proportionate share of all moneys in the hands of said Natchez Investment Company, Inc., due, owing and unpaid, by said company to defendants, J. V. & R. T. Burkes, and to this extent declare and establish a lien in favor of said cross complainant against and upon said

Eola Hotel Building and said funds in the hands of said Natchez Investment Company, Inc., superior to all mortgages, deeds of trust and bond issues on said hotel building.

XIII

And cross complainant further prays that this Honorable Court will interpret and construe the bond given by said J. V. & R. T. Burkes with Hartford Accident & Indemnity Company, as surety thereon, and order, adjudge and decree the same to be not simply a bond of indemnity but such a bond as is contemplated by Section 3 of Chapter 128 of the Laws of 1918, guaranteeing the prompt payment to complainant and all other persons furnishing labor and material to said Defendants, J. V. & R. T. Burkes, in the erection and construction of said Eola Hotel: And, cross complainant prays in the alternative, that if said Court [fol. 47] construes this bond to be a bond only of indemnity and not a bond guaranteeing the payment of the sums due by said J. V. & R. T. Burkes, to cross complainant, and other persons furnishing labor and material to them in the erection and construction of said Eola Hotel, then in such event, this Honorable Court do render a decree declaring said assignment by said Burkes to New Orleans — & Trust Company to be subordinate to all of the rights and liens, claims and demands of this cross complainant against said J. V. & R. T. Burkes, and against the proceeds of said assignment; and that the Court do further render a personal judgment and decree against said New Orleans Bank & Trust Company in favor of cross complainant for its proportionate share of the amount of said assignment, with interest thereon at the rate of 6% per annum from the date of said assignment.

And cross complainant further prays that in such event this Court will further declare the purported deed of trust or mortgage from the Natchez Investment Company, Inc., to S. B. Laub, Trustee, recorded in Book 14, page 478 of said Mortgage Records, and the deed of trust from said Natchez Investment Company, Inc., to Alvin Laub, Trustee, recorded in Book 15 page 140 of said records, to be fraudulent and void, as to cross complainant.

And that the Court do by proper order and decree set the same aside and declare it to be of no effect whatsoever,

as against the rights and lien of cross complainant, and that discovery be made by said Natchez Investment Company, Inc., as to who, if anyone, holds bonds purporting to have been issued and secured by said deed of trust in favor of S. B. Laub, as Trustee, recorded in Book 14 page 478 of said Mortgage Records, and for what purpose said bonds were issued and for what consideration, if any, and as to the disposition and use of the proceeds of said bonds. [fol. 48] And cross complainants further prays that this Court do further decree that the purported assumption of indebtedness of said defendants, J. V. & R. T. Burkes, by said Natchez Investment Company, Inc., to be null and void, and of no effect against the rights, claims and liens of cross complainant, and that to the total amount of said indebtedness, made up of the amount shown in said answer as owing to:—Williamson-Greer Company, Acme Engineering Co., R. Lee Parker, Jr., R. Scudamore, Jr., and Natchez Brick Company, in addition to the Twenty Six Thousand Three Hundred Twenty Three Dollars ($26,323.00), assigned to the New Orleans Bank & Trust Company, and the Four Thousand One Hundred Twenty Two Dollars ($4,122.00) admitted by complainant to be in the hands of Canal Bank & Trust Company, this Complainant is entitled and decreed to have a lien against said Eola Hotel Building for the proportionate amount of its claim and on equal footing with all other subcontractors, journeymen, etc., furnishing labor and material to said defendants, J. V. & R. T. Burkes.

And cross complainant further prays that this Honorable Court will determine and adjudicate the rights of all parties to this suit, and establish, declare and protect the liens of cross complainant, and other parties hereto, having like liens, and that this Court also establish and determine the properties, if any, of said liens.

And cross complainant prays for such other, further and different relief, both general and special, in the premises, as from the nature of its case, he shall be entitled, and as this Court shall deem meet and proper in acordance with the equities herein.

St. Bernard Cypress Company. W. A. Geisenberger, Atty.

[fol. 49] *Duly sworn to by W. A. Geisenberger. Jurat omitted in printing.*

Before me, the undersigned authority, personally came and appeared, J. J. Vetter, who being duly sworn deposes and says: He is manager of St. Bernard Cypress Company, Ltd.; that as such he is familiar with the books and accounts of said Company; that the annexed itemized statement showing an indebtedness due by J. V. & R. T. Burkes, Contractors, to St. Bernard Cypress Company, Ltd., of Two Hundred Eighty-four Dollars and no cents ($284.00), is correct.

J. J. Vetter, Manager.

Sworn to and subscribed before me this 21 day of Oct., 1927. R. E. Millens, Jr., Notary Public. (Seal.)

[fol. 50] In Chancery Court of Adams County

Demurrer of Hartford Accident & Indemnity Company to Bill of Complaint—Filed Jan. 9, 1928

[Title omitted]

Demurrer of the Hartford Accident and Indemnity Company to the original bill of complaint and to the interventions of the Interstate Electric Company of New Orleans, La., and the Coburn Trolley Track Manufacturing Company and Weis, Dreyfus and Seiferth and to all other intervening petitions which may have been or may be filed in this cause.

Comes the Hartford Accident and Indemnity Company a defendant herein and demurs to the original bill of complaint and the petitions of intervention filed herein on the following grounds, to-wit:

1. The bill shows on its face that the bond sued on is not a performance bond within the meaning of Chapter 128 of the Laws of 1918 and the bill further shows on its face that said bond is not controlled by said law.

2. The bill further shows on its face that the bond sued on does not guarantee the faithful performance of the contract by J. T. and R. V. Burkes, within the meaning of Chapter 128, of the Laws of 1918.

3. If the bond be construed as coming within the terms of Chapter 128 of the Laws of 1918 then that law is void because it is an unwarranted interference of the freedom of contract against the following persons:

a. The owner of the property;
b. The contractor;
c. The surety of the contractor;

[fol. 51] and violates Section 1, Fourteenth Amendment of the Constitution of the United States.

4. Said act is further unconstitutional because Section 2 thereof which prohibits the assignment by the contractor of his rights, is violative of the Fourteenth Amendment to the Constitution of the United States, Section 1, in that it is an unwarranted interference with the freedom of contract by contractor.

5. Because it is not within the power of the Legislature of Mississippi to create a contract between persons sue juris.

6. Because to so construe said statute constitutes the taking of property without due process of law in violation of Section Fourteen of the Constitution of the State of Mississippi, and of Section One, of the Fourteenth Amendment to the Constitution of the United States.

7. That section of the law which requires that the contractor's bond, when given at the instance of the owner shall protect third persons not named in the bond is unconstitutional and void in that it is an attempt by the Legislature to—

a. Make a contract between persons without their consent.
b. To give a class of third persons rights without the consent of the parties to the contract and thereby constitute an absolute infringement of the freedom of contact.

8. Chapter 128 of the Laws of 1918 denies to the contractor and his surety the equal protection of the law in violation of Section One of the Fourteenth Amendment to the Constitution of the United States.

9. It is not within the police power of the State to pass such an act as Chapter 128 of the Laws of 1918.

10. Said law violates Section 32 of the Constitution of the State of Mississippi because it is an impairment of the [fol. 52] liberty of contract which is retained by and is inherent in all citizens.

Wells, Stevens and Jones, Attorneys for Hartford Accident and Indemnity Company

We, the undersigned attorneys for the Hartford Accident and Indemnity Company, do hereby certify that in our opinion the foregoing demurrer is good in law and should be sustained.

Wells, Stevens and Jones.

[File endorsement omitted.]

[fol. 53] In Chancery Court of Adams County

[Title omitted]

Decree Overruling Demurrers of Hartford Accident & Indemnity Co.—Filed Jan. 27, 1928

This cause came on to be heard this day in open Court upon the demurrers of the Hartford Accident & Indemnity Co., to the original Bill and to all of the Petitions of Intervenors filed herein against said Hartford Accident & Indemnity Co. and the Court having considered said demurrer is of the opinion that they should be overruled.

It is therefore ordered, adjudged and decreed that the demurrerx of the Hartford Accident & Indemnity Co. to the original Bill of Complaint, and to all of the Petitions of Intervention filed herein, be and the same are hereby overruled.

It is further ordered, adjudged and decreed that the Hartford Accident & Indemnity Co. be and the same is hereby granted an appeal to the Supreme Court of the State of Mississippi to settle the principles of the case, upon complying with the law in such cases.

Ordered, adjudged and decreed, this 27th day of January, 1928.

R. W. Cutrer, Chancellor.

[fol. 54] IN CHANCERY COURT OF ADAMS COUNTY

[Title omitted]

AMENDMENT TO CROSS-BILL

To the Honorable Chancery Court of Adams County, Mississippi:

Now comes the defendant, St. Bernard Cypress Co., Ltd., and with leave of Court first had and obtained, files as an amendment to its cross bill in this cause and as exhibit B thereto and as a part of said original cross bill, the same as if copies in full therein, a copy of the purchase orders from J. V. & R. T. Burkes, defendants to this cross complaint dated November 17, 1926, covering the lumber delivered to said defendant by cross complainant and sued on in said cross bill.

St. Bernard Cypress Co., Ltd., by W. A. Geisenberger, Atty.

[fol. 55] IN CHANCERY COURT OF ADAMS COUNTY

[Title omitted]

AGREED STATEMENT OF FACTS BETWEEN HARTFORD ACCIDENT & INDEMNITY COMPANY AND ST. BERNARD CYPRESS CO., LTD. —Filed July 20, 1929

The following facts are admitted to be correct on the part of the St. Bernard Cypress Company, Ltd., through its attorney, W. A. Geisenberger, and the Hartford Accident & Indemnity Company, through its attorney, L. Barrett Jones, in that certain cause styled Natchez Investment Company, Inc., complainant; vs. J. V. & R. T. Burkes, et al defendants, numbered #5323 on the general docket of the Chancery Court of Adams County, Mississippi, and this agreement may be filed in the cause as the evidentiary matter and the parties hereto to be bound by this agreement when the same is so filed in said cause as to the facts set forth and covered herein, together with the necessary conclusions deducible from said facts herein stated.

That under date of October 12th, 1926, the Natchez Investment Company, Inc., entered into a certain agreement or contract with the defendants, J. V. & R. T. Burkes of

New Orleans, Louisiana, known as Project No. 640 on the files of Weiss, Dreyfus & Seiferth, Inc., Architects of New Orleans, Louisiana, as per copy of said agreement or contract which was filed with the original bill of complaint filed in this cause and marked exhibit "A" thereto; and that the Natchez Investment Company, Inc., is a corporation incorporated under the laws of the State of Louisiana and was so at all times mentioned in the pleadings in this cause and that the said J. V. & R. T. Burkes was a [fol. 56] co-partnership consisting of J. V. Burkes and R. T. Burkes doing a general building contractors business, residents of New Orleans, Louisiana and that the Hartford Accident and Indemnity Company is a Surety Company, doing a general surety business in the State of Mississippi and qualified by its own volition to do business in said state and under the laws of said state and was so qualified at all times mentioned in the pleadings in this cause.

That the said contract and agreement for the construction of said building, which was the Eola Hotel Building in Natchez, Mississippi being Project No. 640 above mentioned, had as a part thereof certain specifications compiled by Weiss, Dreyfus & Seiferth, Inc., Architects, and referred to in said contract and made a part thereof; and that the copy of said specifications filed with the original bill of complaint herein and marked exhibit "B" thereto, is correct. That on the 20th day of October, 1926, the said J. V. & R. T. Burkes in compliance with the said contract and specifications, furnished the Bond mentioned in the original bill of complaint as shown by the copy thereof filed as Exhibit "C" to said original bill of complaint and that said copy so filed as said exhibit is correct; and that the Hartford Accident and Indemnity Company was the surety on said Bond and on said date executed the same as surety.

That thereafter the said J. V. & R. T. Burkes, contractors, proceeded to construct the said Eola Hotel Building under said contract and specifications and that said building was accepted by the Natchez Investment Company, Inc., on or about the 10th day of August, 1927. That the said Natchez Investment Company was the owner of the property upon which said Hotel Building was erected and was and is the owner of the erected Eola Hotel Building.

[fol. 57] That the St. Bernard Cypress Company, Ltd., at the special instance and request of the defendants,

J. V. & R. T. Burkes, furnished and delivered unto the said J. V. & R. T. Burkes, certain quantities of building materials, lumber, for use in the construction and erection of the said Eola Hotel Building under said Project No. 640; that said materials, lumber, were purchased by the said J. V. & R. T. Burkes, as contracted, for use in the construction of the said Eola Hotel Building and that same were purchased and sold to said J. V. & R. T. Burkes on January 20th, 1927, at and for the total price and sum of Two Hundred Eighty-four Dollars ($284.00) all of which is shown by the sworn itemized statement of said account attached to the answer and cross bill of complaint of said St. Bernard Cypress Company, Ltd. and made a part thereof and marked Exhibit "A" thereto, and that said sworn itemized statement of account is correct; that there remains due and owing unto said St. Bernard Cypress Company, Ltd., by the said J. V. & R. T. Burkes, for said materials, lumber, furnished as aforesaid, the principal sum of Two Hundred Eighty-four Dollars (284.00) with interest thereon at the rate of 6% per annum from February 20th, 1927, and that all of the lumber alleged by said St. Bernard Cypress Company, Ltd., in its cross bill to have been so sold was used by said J. V. & R. T. Burkes in the erection and construction of the Eola Hotel Building under said Project No. 640; and that said lumber is now incorporated in the said Eola Hotel Building and that the costs and prices charged for the same and the entire amount sued on is just, fair and reasonable, and at a price and sum agreed to by the said J. V. & R. T. Burkes and the said St. Bernard Cypress Company, Ltd., and that said amount with interest as aforesaid is due, owing and unpaid by the said J. V. & R. T. Burkes for said lumber.

That on the 24th day of October, 1927, the St. Bernard [fol. 58] Cypress Company, Ltd., gave notice to the said Natchez Investment Company, Inc., the owner of the Eola Hotel Building, and property on which the same is situated in strict conformity with Chapter 128 of the Laws of the State of Mississippi of 1918, that it had furnished said materials, lumber and that the amount due therefor was unpaid; and that the said St. Bernard Cypress Company, Ltd., fully complied with the provisions of Chapter 128 of the Laws of the State of Mississippi of 1918 for the giving of notice to the owner of the amount owing for material used in the construction of said Hotel Building.

That the said J. V. & R. T. Burkes have defaulted in the payment of the aforementioned sum to the said St. Bernard Cypress Company, Ltd., and that demand has been made upon them to pay said amount which they have failed and refused to do.

That it should be finally held in this cause, by the Court, that the Bond hereinabove referred to as having been executed by the Hartford Accident & Indemnity Company as surety thereon, on the terms and conditions as shown by the pleadings in this cause, was and is a Bond guaranteeing the faithful performance on the part of the said J. V. & R. T. Burkes, Contractors, of their contract for the construction of said Eola Hotel Building under said Project No. 640, as alleged in the pleadings in this cause, and that same is still in force, then the said St. Bernard Cypress Company, Ltd., is entitled to a judgment against the Hartford Accident & Indemnity Company for the full amount herein sued for and demanded, as hereinabove agreed and as alleged in the cross bill of complaint filed by said St. Bernard Cypress Company, Ltd.; but the Hartford Accident & Indemnity Company does not agree that they are liable for interest on said amount but the question of liability for interest is left to the decision of the Court, as a matter of legal construction under the contract, docu-
[fol. 59] ments and Bond. That no attorneys fees were demanded by said St. Bernard Cypress Company, Ltd., in any of the pleadings filed by it in this cause.

Nothing herein contained shall in anywise be taken as an agreement by the Hartford Accident & Indemnity Company that this is a concursus proceeding or a proceeding in anywise akin thereto, or that it was made necessary by the Hartford Accident & Indemnity Company, or that the Bond herein given by it was a Bond guaranteeing the faithful performance of the contract, or that the Bond is still in force; but such matters are left to the Court for determination as a matter of legal construction on the proof, pleadings, contract documents, exhibits, Bond and law.

This the — day of ——, A. D. 1929.

St. Bernard Cypress Company, Ltd., by W. A. Geisenberger, Atty. Hartford Accident & Indemnity Company, by L. Barrett Jones, Atty.

[File endorsement omitted.]

[fol. 60] IN SUPREME COURT OF MISSISSIPPI, DIVISION B

27293

HARTFORD ACCIDENT & INDEMNITY CO.

vs.

NATCHEZ INVESTMENT CO.

OPINION—Filed Dec. 3, 1928.

ETHRIDGE, J.:

This is an appeal from a decree of the Chancery Court of Adams County overruling appellant's demurrer to the original bill of the Natchez Investment Co., Inc., and to answers and cross bills filed by the intervenors in the suit.

The Natchez Investment Co., Inc., filed its bill against the Hartford Accident & Indemnity Co., upon a contract of indemnity for the performance of a contract for the construction of a hotel building for the Natchez Investment Co., Inc., by J. V. and R. T. Burkes, a co-partnership doing business in New Orleans, La. The bill set out the making of a contract between J. V. and R. T. Burkes and the Natchez Investment Company, making the plans and specifications for the building, the contract between J. V. and R. T. Burkes and the Natchez Investment Co., Inc., and also the bond given by the Hartford Accident & Indemnity Co. exhibits to the bill.

It is alleged that under date of October 18th, 1926, the Natchez Investment Co., Inc., entered into a certain agreement or contract with J. V. and R. T. Burkes, for the construction of a certain building in Natchez, known as Project No. 640 on the files of Weiss, Dreyfus, Inc., Architects at New Orleans, La.; that said contract or agreement had as a part thereof certain specifications compiled by the [fol. 61] architects and referred to said contract and made a part thereof (copy of which specifications were made a part of the bill); that the said specifications contained 126 numbered pages, and also three pages preceding these numbered ones, all bound in a binder, and marked "Plans No. 640. Specifications for the Eola Hotel, a seven story fire proof building to be erected at Natchez, Miss." It is alleged

that in the said specifications appears the following language:

"Article 30. It shall be the obligation of every contractor and subcontractor estimating upon work under this contract operation to figure and to include within his bid to furnish a bond in the sum and conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the owner or Architects; contractor likewise to pay the cost of any required cancellation of the same. He shall also secure and pay for lien and privilege certificate which will be required of him before final payment is made under this contract.

"The bond shall also secure the owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary.

Guarantee.—It is the intent of the architect to secure first class, permanent material and construction, and to this end each contractor will be held responsible for and [fol. 62] must rectify all defects discovered in his work within one year after the completion of the entire structure and its acceptance by the architect. Should any material or workmanship called for by these specifications, be of such a nature as to render this guarantee impossible, notice of this effect must be served in writing upon the Architects previous to the signature of the contract; failure to do so will be construed as tacit agreement to the strictest terms of this guarantee.

"Obligations of Bondsmen.—The contractor's bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contracts covering the work executed hereunder, and the owner and the architect reserve the right to make all desired changes, alterations, and additions, under the conditions and in the manner hereinbefore described, without in any measure affecting the liability of the bondsmen or releasing them from any of their obligations hereunder. The Owner and the architect reserve the right to make such changes, alterations, and

additions in the manner specified without notice to the contractor's surety, and waiver of such notice shall not affect the validity of the bond.

"The sureties for the various contractors shall be, and are hereby declared and acknowledged themselves to be, bound to the owner as guarantors, separately and in solido with the contractors of the fulfilment of the terms of the foregoing."

The bond given and made Exhibit "C" to the declaration, contained the following language:

[fol. 63] "Whereas, the principal and the obligee have entered into a certain written contract (hereinafter called the contract,) dated October 18th, 1926, to construct Eola Hotel building as per plans and specifications #640, prepared by Weiss & Dreyfus, Architects, New Orleans, La., a copy of which is or may be attached hereto, and is hereby referred to and made a part hereof,

"Now, therefore, the condition of this obligation is such that if the Principal shall idemnify the Obligee against loss or damage directly caused by the failure of the Principal faithfully to perform the contract, then this obligation shall be null and void; otherwise it shall remain in force; provided, however, this bond is executed by the Surety, upon the following conditions, which shall be precedent to the right of recovery hereunder.

"1. The Obligee shall, at the time and in the manner specified in the contract, fully comply with all the terms thereof, and if the obligee default in the performance of this bond, or in the contract, the surety shall thereupon be relieved of all liability hereunder.

"2. If the Principal shall in any manner default in the performance of any manner or thing specified in the contract, the Obligee shall immediately so notify the Surety and thereafter the surety shall have the right at its option to assume, or assume and sublet the contract, and to proceed thereunder as if no default or abandonment had occurred, and in such event all moneys agreed in the contract to be paid the Principal and which at the time of de- [fol. 64] fault or abandonment are unpaid by the Obligee shall thereupon belong and become payable to the Surety and shall be paid to it.

"3. If at any time there come to the notice or knowledge of the Obligee information that any claim for labor performed or for materials furnished the Principal in or upon the work specified in the contract remains unpaid, or that any lien or notiec of lien for such work or materials has been filed or served, the Obligee shall withhold from the Principal payment of any moneys due to or to become due to the Principal under the contract until the payment of such claim or discharge of such lien or notice of lien, and will so notify the Surety giving a statement of the particular facts and amount of each such claim, lien or notice of lien.

"4. If any changes or alterations by the Principal or Obligee shall be made in the plans or specifications for the work described in the contract, the Obligee shall immediately notify the Surety thereof, giving a description and stating the amount of money involved by such changes or alterations. Provided, however, that should the cost of such changes or alterations in the aggregate amount to a sum equal to 10 per cent of the penal sum of this bond, no further changes or alterations shall be made by the principal or obligee until the consent of the Surety shall first be obtained thereto. * * *

"6. This bond does not apply to nor cover guarantees of the work specified in the contract; nor of its efficiency; nor of the wearing qualities thereof; not for maintenance of or repairs thereto unless hereinafter specifically agreed [fol. 65] to as being covered by this bond; nor for the furnishing of any bond: nor to the payment of any damages or compensation either at common law or under any statute, Federal or State, arising from or growing out of injuries to persons or property; nor for failure to procure insurance or to comply with any statute covering such damages or compensation; nor the furnishing of any policy of insurance: nor for damages caused by delay in completing the work except such damages as have actually been sustained and proved."

The bill further alleged that "the said J. V. & R. T. Burkes proceeded to construct the said Eola Hotel under the said contract and specifications, and the Natchez Investment Co., Inc., accepted the said hotel under an agree-

ment dated August 10th, 1927, by which the said J. V. and R. T. Burkes agreed that, notwithstanding the acceptance of the said hotel by complainant, that should the Architects later determine that any work done in connection with the hotel had been faulty or improperly done or neglected, that then the said contractors, J. V. and R. T. Burkes, would be held and bound to construct, correct and supply such work, labor and material as might be determined by the Architects to be furnished, constructed, corrected or supplied on said hotel job, and a copy of said contract, is filed herewith, marked Exhibit "D", and made a part hereof for all purposes; that payments were made to the said contractors for all sums owing under same as agreed between the said contractors and complaintnat, except for the sum of $4,122.00, which amount is in the hands of the Canal Bank & Trust Co. of New Orleans, La., Trustee for the disbursement of the building fund that had been provided by a first mortgage bond issue for the building of said hotel; that before the disbursement of said $4,122.00 to the said J. V. [fol. 66] and R. T. Burkes, your complainant received written notices from various persons who had supplied materials to the said contractors in the building to the Eola Hotel, stating that they had not been paid for the material furnished, and complainant here offers to have said Trustee pay said amount into court," and the names of the parties furnishing complainant with lists of materials furnished contractors, for which payment had not been made, were set out in the bill. The amount of the said claims aggregated the sum of about $62,073.29. The bill further alleged that, "Thereupon the said $4,122.00, balance owing the said J. V. and R. T. Burkes out of the construction fund, was not paid over, but still remains in the hands of the trustee; that complainant also received notice that New Orleans Bank & Trust Co. had been assigned by J. V. and R. T. Burkes part of the claim of J. V. & R. T. Burkes against complainant in connection with the construction of the said hotel in the amount of $26,323.00, and the said J. V. & R. T. Burkes and the New Orleans Bank & Trust Co. have brought suit in the Circuit Court of Adams County, Miss., No. 1305 on the docket of the Circuit Court of Adams County, Miss., claiming the said balance to be owing on the building of the Eola Hotel, and that said balance has been assigned to New Orleans Bank & Trust Co., and complain-

ant denies owing said balance on said contract; that under the agreement, Exhibit "D" hereto, the said contractors are liable to correct improper work and faulty work done in connection with the said Eola Hotel to an amount estimated to be the value of $6,000.00; that, among the parties above mentioned as having given notice to complainants of claims against said contractors which have not been paid, is O. L. Bunn, doing business as Bunn Electric Co., who has brought suit in the Circuit Court of Adams County, Miss., "against the said contractors and the complainant for amounts owing by said contractors, J. V. and R. T. Burkes, and unpaid by them.

[fol. 67] The bill further alleges, "That the Hartford Accident & Indemnity Co., one of the defendants herein, has been notified that under its bond it is liable for all sums owing by the said contractors, J. V. and R. T. Burkes, in connection with the building of the Eola Hotel, and has denied its liability on its said bond, claiming that its said bond is not a bond that guarantees the faithful performance of the contract, but is a bond of indemnity; that Section 2, Chapter 128 of the Laws of 1918 for the State of Mississippi (Hemingway's Code of 1927, Sec. 2597), denies to any contractor the right to assign, transfer or dispose of in any way the contract or the proceeds thereof to the detriment or prejudice of sub-contractors, journeymen, laborers and material men as declared in said Act and provides that all such assignments, transfers or dispositions shall be subordinate to the rights of sub-contractors, journeymen, laborers and material men as well as the owner; that should it be held and determined that the bond furnished by the contractor to the complainant in this case is not a bond for the faithful performance of the said contract, project #640, then in such case any assignment made by the said J. V. and R. T. Burkes to New Orleans Bank & Trust Co. of the proceeds of said contract would be subordinate to the rights and claims of the sub-contractors and material men mentioned herein, and to whom the said J. V. and R. T. Burkes owe money for material furnished in the construction of the Eola Hotel; that under said contract, specifications and bond, and under the law, your complainant is entitled to bring suit against said contractors and said surety on said bond and to bring in all sub-contractors and material men having claims for material furnished in the building of said

Eola Hotel, and for which material they have not been paid by the said contractors, and is entitled to have it ascertained and determined whether or not the said bond given in connection with said contract and specifications is a bond for the faithful performance of said contract, or simply a bond of indemnity."

[fol. 68] It is further alleged that the complainant, by reason of the facts set forth, had incurred attorneys' fees in connection with the suit, and prayed for an allowance of attorneys' fees under the contract; that complainant "is entitled to have and recover under said bond the amount and value of work necessary to be done and labor and material necessary to be furnished by said contractors to complete and maintain the said Project #640 according to plans and specifications and which complainant avwrs is the sum of $15,000.00; that the parties herein named as furnishing material in connection with said project #640 to said contractors have not been paid and are entitled to recover the amounts owing to them by said contractors and to have judgment for said amounts on said bond.

ETHRIDGE, P. J., after stating the above facts, delivered the opinion of the Court:

Section 1 of Chapter 128, Laws of 1918, (Hemingway's 1927 Code, Section 2597) amends Section 3074, Code of 1906, giving to sub-contractors, laborers, etc., the right to bind the amount due the contractor by written notice provided for in said section, and, when such notice is given, the funds then due by the builder to the contractor are impounded in favor of such material-men, sub-contractors, laborers, etc. By Section 2 of Chapter 128, Laws of 1918, (Hemingway's 1927 Code, Section 2597) it is provided that "No contractor or master workman, except as hereinafter provided, shall have the right to assign, transfer, or otherwise dispose of, in any, the contract or the proceeds thereof, to the detriment or prejudice of the sub-contractors, journeymen, laborers and materialmen, as declared hereinbefore, and all such assignments, transfers, or dispositions shall be subordinate to the said rights of the sub-[fol. 69] contractors, journeymen, laborers and materialmen, as well as the owner. Provided, however, that this section shall not apply to any contract or agreement where the contractor, or the master workman shall enter into a

solvent bond conditioned as provided for in Section 3 hereof."

It will be seen from a study of these two sections that the legislature has provided a lien upon funds due the contractor by the builder in favor of laborers, journeymen, sub-contractors and materialmen. When the conditions of the statute are complied with, the builder is obliged to hold, for the purpose — paying or satisfying these claims, at least, to the extent that such funds due the contractor by him will pay them; and if such funds are insufficient to pay them in full, they shall be prorated. In practically all of the States, such liens are in force, and are upheld as valid regulations of contract rights by the Legislature. A giving of liens in favor of those who have performed labor or furnished material which is used in a building where the builder has not, prior to such notice, paid out the contract price, are universally upheld. Such sections are in furtherance of a wise public policy, designed to protect people whose labor and material have been furnished to the contractor for use in the building constructed by him for a third person.

As we understand this, Section 1 is in no wise challenged as being within the competence of the Legislature to enact, but Section 2 of the Act is challenged as impairing the right of a contractor to make contracts and to receive the price therefor, and dispose of it, as he sees proper, as a necessary incident to the protection of his business. Of course, the section does not prohibit the sub-contractors, journeymen, laborers and materialmen from waiving such right or entering into contracts by which such rights are waived or otherwise provided for, but it does give rights to the sub-contractors, journeymen and laborers and materialmen against the funds due the principal contractor for the pro- [fol. 70] tection of their contracts with him, and in furnishing labor and material in carrying out his contract. The Legislature has the power to regulate the right of contract in a reasonable manner, so long as the right to contract is not destroyed or seriously impaired. The effect of the statute before us in the case named is similar to impounding money due to one person by a process of garnishment to the satisfaction of the claims of another person against the owner of such funds, and it has always been, as we understand it, permissible for the Legislature to pro-

vide remedies to parties furnishing labor and material, or in selling property, by providing liens or other proceedings impounding the property, or its proceeds.

The contractor making a contract with sub-contractors, journeymen, laborers, materialmen has no constitutional rights to be free from the obligation of paying them, nor has he the right to claim the proceeds derived from the builder under his contract, free from the claim of the laborers, sub-contractors, journeymen and materialmen with whom he has contracted, and whose material or labor he has secured in the performance of his own contract. We see no difference in principle in providing the security given by Section 2 to such sub-contractors, journeymen, laborer*w* and materialmen from that given by law in Section 1 of the statute. We recognize the difference in the power of the Legislature to deal with contracts made by public bodies, such as the state, county, or municipality, or other agencies of the public, and the right to regulate contracts made between private individuals. In case of public bodies and public corporations, being agencies of the state; acting for its purposes and having such powers only as the State confers upon them, the State has, in the absence of constitutional restr*u*ction, a plenary right to prescribe the terms and conditions of public contracts, or contracts of public boards, or municipalities, and parties dealing with such [fol. 71] powers or agencies of the State, deal with them in the light of the law giving them power and imposing restrictions upon their right of contract. But, in the case of individuals, the Legislature had no such plenary right. The citizen has the liberty of contracting, which cannot be entirely destroyed by the State, except in given circumstances deemed necessary for the protection of the public. In the case of private contracts, the Legislature can only impose reasonable regulations and restrictions, etc., and cannot entirely take away the right, nor deny it to such an extent as to substantially destroy the right. However, its power to regulate contracts and provide conditions under which they can be made and enforced is quite large, and it is a delicate question to draw any precise limitation upon such right. We do not think Section 3 of Chapter 128 of the Laws of 1918 goes beyond the constitutional limit in this record. This section does not prohibit parties from making reasonable contracts, it does not require the bond

therein provided for to be executed by the parties, nor does it prohibit them from taking other kinds of bonds or contracts of a reasonable nature in conducting their business of contracting. The section provides that:

"When any contractor or sub-contractor entering into a formal contract with any person, firm or corporation, for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation, guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations that such contractor or sub-contractor shall promptly make payments to all persons furnishing labor — material under said contract," etc.

This bond comes into operation when the parties enter into the kind of contract and the kind of bond provided [fol. 72] for in the section, and does not intend to prevent the parties from making other and different contracts and bonds; but, if a bond is not given, as provided for in Section 3 of the statute, then Section 1 and 2 continue in force for the benefit of the materialmen, sub-contractors, journeymen and laborers, and they have the full right to protect their interests in accordance with the terms of these sections. If the parties desire to be freed from the operation of sections one and two, they may execute the bond provided for in Section three, and, when that is done the contractor and owner, or builder, are freed from the provisions of Sections one and two, and the bond given stands in lieu or instead of the securities provided for in such sections and operates for the benefit, not only of the contractor and the builder, but for such other persons as well.

Does the bond given in the present case come within the provisions of Section 3. In other words, is it such a bond as is provided for therein?

In determining this question, we are to construe the bond in the light of the contract which the bond refers to, and, in so doing, it will appear that the parties intended to execute the bond provided for and required by the contract between the owner and contractor, and, by reference to the quoted provisions in the statement of facts, it will be seen that the contractor was required to give such a

bond as was called for by Section 3 of the act; and, we think it was the intention of all the parties to give the bond therein provided for, and that the bond is to be construed in connection with the contract it was designed to protect the owner and contractor, and that it was so dealt with by all parties. It will be seen from a recital of the bond itself that it referred to the contract, and to the plans and specifications made a part of the contract and the bond. This being true, it is plain we think that it was the intention and purpose of the parties to execute a bond [fol. 73] in conformity with Section 3 of the Act above quoted.

This brings the case within the decision rendered in the case of U. S. F. & G. Co. v. Parsons, et al 147 Miss. 335, 112 So. 469, and that case controls the present case. Consequently, it is manifest that the contractor was free to make assignments of the amount due, and that the amount assigned to the bank was a valid assignment, freed from the claims of the sub-contractors, journeymen, laborers and materialmen.

We do not think the cases relied on construing Chapter 217, Laws of 1918, which provides for the bonds and the securities of people who furnish labor and material for public works have any controlling force in the present case. As stated above, no constitutional question arises as to the power of the legislature to dictate the terms and conditions of public contracts, and the necessary conditions and requirements deemed by the Legislature to be proper in such cases.

The judgment of the court below will be affirmed, and the cases remanded for further proceedings in accordance with this opinion.

Affirmed and remanded.

[File endorsement omitted.]

[fol. 74] IN SUPREME COURT OF MISSISSIPPI,
DIVISION B

27293

THE HARTFORD ACCIDENT & INDEMNITY CO.

vs.

THE NATCHEZ INVESTMENT COMPANY ET AL.

JUDGMENT ON THE APPEAL FROM THE CHANCELLOR'S DECREE OVERRULING THE DEMURRER—Dec. 3, 1928

This cause having been submitted on a former day of this term on the record herein from the Chancery Court of Adams County and this court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order, and adjudge and decree that the decree of said Chancery Court rendered in this cause on January 27th, 1928, be and the same is hereby affirmed and this cause is hereby remanded to the court below for further proceedings in accordance with the opinion this day rendered. It is further ordered, adjudged and decreed that the appellant and Mississippi Fire Insurance Company, surety in the appeal bond, do pay the costs of this appeal, to be taxed, etc.

[fol. 75] IN CHANCERY COURT OF ADAMS COUNTY

c. # 5323; B., # 176

NATCHEZ INVESTMENT COMPANY, INC., Complainant,

vs.

J. V. & R. T. BURKES, T. J. BARTLETT, Trustee in Bankruptcy for J. V. & R. T. Burkes; Hartford Accident & Indemnity Company, et als., Defendants

DECREE—Filed Jan. 10, 1930

This cause coming on for hearing on the Bill of Complaint filed herein and all pleadings filed herein and on oral testimony and depositions and Agreed Statements

of Fact as filed herein, and the Defendants, J. V. & R. T. Burkes and T. J. Bartlette, Trustee in Bankruptcy for Burkes, as principal, and Hartford Accident & Indemnity Company having appeared herein and filed Answers and being before the Court, and the Court having listened attentively to the evidence, to the Depositions introduced and to the Agreed Statement of Fact filed herein, and having heretofore during the regular July Term 1929 of Chancery Court of Adams County, Mississippi, by agree-[fol. 76] ment of all parties entered a Decree herein under date of August 1st, 1929, enrolled in Minute Book I, page 363 of the Chancery Minutes of said Court, set said cause for final hearing and decree in vacation the same as in term time, and the Court being now ready to find a Decree in said cause and being fully advised in the premises, doth Order, Adjudge and Decree:

That the Bond herein sued on, executed by J. V. & R. T. Burkes, as principal, and Hartford Accident & Indemnity Company of Hartford, Connecticut, as surety, by virtue of the Contract Documents and under the Law of the State of Mississippi, is a Bond guaranteeing the faithful performance of the Contract for the execution and construction of the Eola Hotel Building in Natchez, Adams County, Mississippi, being Project No. 640 on the Files of Weiss, Dreyfus & Seiferth, Inc., Architects, of New Orleans, Louisiana, and that said Bond now and at all times mentioned herein was and is still in full force and effect, and that the surety on said bond, Hartford Accident & Indemnity Company of Hartford, Connecticut, is by this Court decreed to be liable on said Bond for the payment of the respective sums hereinafter set forth and decreed to be due and owing to the respective creditors, or claimants, hereinafter set forth, and that said F. V. & R. T. Burkes, as principal, and Hartford Accident & Indemnity Company, jointly and severally, liable in said respective sums to said respective claimants.

It is further Ordered, Adjudged, and Decreed that the said Hartford Accident & Indemnity Company and said J. V. Burkes and R. T. Burkes are jointly and severally [fol. 77] liable to said claimants for interest on the amounts respectively due to each in the sums and amounts set forth hereinafter as for amounts of interest, and that such respective interest items have been calculated to the date

of this Decree, and that said principal sums of indebtedness likewise bear interest from and after said date of this Decree at six (6%) per cent per annum.

It is further Ordered, Adjudged and Decreed that there is to be paid for and in behalf of Engle & Laub to the said Complainant, Natchez Investment Company, Inc., the sum of Five Thousand and no/100 ($5,000.00) Dollars, and to I. Levy, Receiver for said Natchez Investment Company, Inc., and/or T. S. Sholars, Trustee in Bankruptcy for Natchez Investment Company, Inc., the said Angle & Laub being the Attorneys of record who rendered services herein for and in behalf of said Natchez Investment Company, Inc., in bringing the original proceedings herein; and said proceedings being concursus proceedings, or in the nature of concursus proceedings, and under the Bond given in this cause and under the facts said Complainant is entitled to recover its attorneys' fees for the bringing of such proceedings, said proceedings having been brought within six months from the date of the completion of Project No. 640 hereinabove set forth, and the bringing of such proceedings becoming necessary under the facts in this case,—and such amount of Five Thousand Dollars, as aforesaid, is hereinafter adjudged and allowed.

[fol. 78] And it is thereupon further Ordered, Adjudged, and Decreed that said Intervenors and the Cross-Complainants herein do have and recover, of, from, and against said J. V. Burkes and said R. T. Burkes and Hartford Accident & Indemnity Company, of Hartford, Connecticut, jointly and severally, Judgment for principal, and interest, as hereinafter set forth, to-wit:

O. L. Bunn, doing business as Bunn Electric Company:	
Principal	$4,197.87
Interest	596.10
Total of Judgment here rendered	$4,793.97
The Coburn Trolley Track Mfg. Co.:	
Principal	$2,905.91
Interest	436.85
Total of Judgment here rendered	$3,342.76

Gibbens & Gordon, Inc.:	
Principal	$3,219.77
Interest	353.49
Total of Judgment here rendered	$3,755.26
Hockaday, Inc.:	
Principal	$2,611.15
Interest	426.24
Total of Judgment here rendered	$3,037.39
The R. C. Lieb Company:	
Principal	$1,197.45
Interest	166.67
Total of Judgment here rendered	$1,364.12
Natchez Drug Company:	
Principal	$125.62
Interest	18.21
Total of Judgment here rendered	$143.83
National Show Case Company:	
Principal	$417.45
Interest	61.74
Total of Judgment here rendered	$479.19
Schwartz & Stewart:	
Principal	$149.19
Interest	21.63
Total of Judgment here rendered	$170.82
[fol. 79] Walter C. Schultz, doing business as Schultz Cabinet Works:	
Principal	$399.40
Interest	59.94
Total of Judgment here rendered	$459.34
Southern Cement Company:	
Principal	$1,729.28
Interest	290.78
Total of Judgment here rendered	$2,020.06

Tuscon Steel Company:	
Principal	$3,458.65
Interest	762.04
Total of Judgment here rendered	$4,220.69
White Stone Company, Inc.:	
Principal	$503.52
Interest	75.54
Total of Judgment here rendered	$579.06
Woodward, Wight & Company, Ltd.:	
Principal	$1,579.69
Interest	267.12
Total of Judgment here rendered	$1,846.81
R. Lee Parker, Jr.:	
Principal	$1,936.10
Interest	299.68
Total of Judgment here rendered	$2,233.78
R. Scudamore, Jr.:	
Principal	$1,398.43
Interest	215.00
Total of Judgment here rendered	$1,613.43
R. Lee Parker, Jr., and R. Hicks Parker, Co-partners doing business as Natchez Brick Company:	
Principal	$3,958.50
Interest	562.79
Total of Judgment here rendered	$4,521.29
Walter Williamson and A. A. Greern co-partners doing business as Williamson-Greer Co. of Dallas, Texas:	
Principal	$12,815.10
Interest	2,018.32
Total of Judgment here rendered	$14,833.42

G. R. Burkett, doing business as Burkett Sheet Metal Works:	
Principal	$2,612.99
Interest	426.56
Total of Judgment here rendered	$3,039.55
[fol. 80] W. A. Jacobie:	
Principal	$4,017.72
Interest	519.82
Total of Judgment here rendered	$4,537.54
St. Bernard Cypress Co.:	
Principal	$284.00
Interest	48.80
Total of Judgment here rendered	$332.80
Geisenberger Bros. Drug Co.:	
Principal	$78.09
Interest	10.65
Total of Judgmenr here rendered	$88.74
M. P. Phelan:	
Principal	$98.81
Interest	14.69
Total of Judgment here rendered	$113.50
Enochs Lumber & Mfg. Co.:	
Principal	$8,717.63
Interest	1,285.75
Total of Judgment here rendered	$10,003.38
Southern G. F. Co.:	
Principal	$3,148.00
Interest	524.17
Total of Judgment here rendered	$3,672.17
Feltus Bros. Hardware Co.:	
Principal	$380.87
Interest	56.10
Total of Judgment here rendered	$436.97

Chamberlain Metal Weather Strip Co.:	
Principal	$410.00
Interest	60.47
Total of Judgment here rendered	$470.47
Ingalls Iron Works:	
Principal	$562.10
Interest	76.48
Total of Judgment here rendered	$638.58
Capitol Paint & Glass Co.:	
Principal	$517.33
Interest	76.25
Total of Judgment here rendered	$593.38
Mosler Safe & Lock Company:	
Principal	$218.14
Interest	33.79
Total of Judgment here rendered	$251.93

[fol. 81] Natchez Investment Company, Inc., and/or I. Levy, Receiver for Natchez Investment Company, Inc., and/or T. S. Sholars, Trustee in Bankruptcy for Natchez Investment Company, Inc., the sum of $5,000.00

as Attorneys' fees for services rendered by Engle & Laub, Attorneys in this cause, to be paid to them.

It is further Ordered, Adjudged, and Decreed that the total of said judgments hereinabove awarded and rendered shall bear interest at the rate of six (6%) per cent. per annum from this date until paid and that all costs accrued in this cause to be taxed to be paid by said J. V. Burkes and R. T. Burkes and Hartford Accident & Indemnity Company, jointly and severally, for all of which let execution issue.

It appearing to the Court that several of the materialmen, sub-contractors, and laborers who have intervened and filed cross-bills of Complaint in this cause have claimed an allowance of attorneys' fees for the services of attorneys employed by them in the prosecution of their claims in this cause, said claimants demanding such allowance of attorneys' fees upon the provisions of the contract documents and bond to the effect that the Bond shall pro-

vide for the payment of reasonable attorneys' fees incurred in the enforcement of the contract, and such claimants for attorneys' fees contending that their proceedings for the enforcement of the payment of their claims were proceedings brought for the enforcement of the contract, the faithful performance of which was guaranteed under and by virtue of the terms of the contract documents and bond,—and it appearing to the Court from the evidence in this cause that were such attorneys' fees allowable to these claimants demanding the same that an allowance of fifteen (15%) per cent. of the principal and interest herein al- [fol. 82] lowed to each would be and is a just, fair, and reasonable sum for allowance as attorneys' fees; and were the Court of the opinion that such attorneys' fees were allowable to said respective claimants in this cause, the Court would render Judgment here for each respectively on account of attorneys' fees, in addition to the principal and interest allowed by way of judgment to them, as follows, to wit:

O. L. Bunn, doing business as Bunn Electric Company	$719.10
Coburn Trolley Track Mfg. Co.	501.41
Gibbens & Gordon, Inc.	563.29
Hockaday, Inc	455.61
The R. C. Lieb Company	204.62
Natchez Drug Company	21.58
National Show Case Company	71.87
Schwartz & Stewart	25.62
Walter C. Schultz, doing business as Schultz Cabinet Works	68.90
Southern Cement Company	303.00
Truscon Steel Company	633.10
White Stone Company, Inc.	86.86
Woodward, Wight & Company, Ltd.	277.02
R. Lee Parker, Jr.	335.36
R. Scudamore, Jr.	242.01
R. Lee Parker, Jr., and R. Hicks Parker, co-partners doing business as Natchez Brick Company	678.19
Walter Williamson and A. A. Greer, co-partners doing business as Williamson-Greer Co., of Dallas, Texas	2,225.01
Mosler Safe & Lock Company	37.79

[fol. 83] and the Court does hereby adjudicate said amounts as being just, fair, and reawonable as an allowance for attorneys' fees to said several claimants respectively should it be considered by the Court that such claimants under the contract documents and bond were entitled to recover attorneys' fees in this cause; however, in the opinion of the Court, after considering the terms of the contract documents and the bond, though the proceedings brought by the several intervenors and cross-complainants were proceedings brought for the enforcement of the contract, in that such proceedings were brought to enforce the provisions of the contract requiring the principal Contractor to pay to all sub-contractors, materialmen, and laborers the amounts accrued to them for material and labor furnished and used in and about the erection, construction, and finishing of the Eola Hotel; yet, in the opinion of the Court, under the provisions of said contract documents and bond attorneys' fees are allowable only to the principal obligee under the Bond, being the owner of the property.

And it further appearing unto the Court that N. O. Nelson Manufacturing Company as Assignee of A. W. Moore, doing business as Acme Engineering Company, obtained leave of the Court to intervene in this cause as a Defendant and Cross-Complainant as of right by Decree rendered by the undersigned Chancellor on the 14th day of August, 1929, duly enrolled in the Minutes of this Court, and that said N. O. Nelson Manufacturing Company as Assignee of A. W. Moore, doing business as Acme Engineering Company, thereafter pursuant to said permission ontervened herein and did file its Answer and Cross-Bill of Complaint [fol. 84] seeking to recover against said J. V. & R. T. Burkes and said Hartford Accident & Indemnity Company the principal sum of Five Thousand Nine Hundred and Seventeen and 53/100 ($5,917.53) Dollars and interest and attorneys' fees on said sum for labor and materials furnished in and about the erection and construction of the Eola Hotel Building in Natchez, Adams County, Mississippi, being Project No. 640; and it further appearing that thereafter Hartford Accident & Indemnity Company filed a Motion in this cause moving the Court to strike from the files the said Intervention and Cross-Bill of Complaint of

said N. O. Nelson Manufacturing Company; and it further appearing that the issues as to said claim and intervention of said N. O. Nelson Manufacturing Company have not yet been heard or tried by this Court, it is thereupon further Ordered, Adjudged, and Decreed that said issue as to the intervention and claim of said N. O. Nelson Manufacturing Company be continued to be heard and determined at the regular January Term, 1930 of the Chancery Court of Adams County, Mississippi, it being the intention by this Order to reserve unto all parties concerned in said claim and intervention all rights and remedies they would have had not this Decree been entered and rendered at this time.

It is further Ordered, Adjudged, and Decreed that all issues involved in this cause not determined heretofore or by this Decree be and the same are hereby continued for hearing and determination at the January Term 1930 of the Chancery Court of Adams County, Mississippi.

[fol. 85] It is further Ordered, Adjudged, and Decreed as to the suit of J. V. and R. T. Burkes and New Orleans Bank & Trust Company brought in the Circuit Court of Adams County, to establish a mechanics' lien on the Eola Hotel and transferred to this Court and in which a motion to dismiss because prematurely brought was filed in Circuit Court, Adams County, and heard by this Court in this cause the Court will Reserve its ruling at this time because all Briefs in this issue have not been filed with the Court, the Court Reserving the right to render its Decree as to the issue involved as aforesaid at any time hereafter in term time or vacation.

The Hartford Accident & Indemnity Co. excepts to this decree. Any parties to the litigation interested in this Decree may have their appeal as provided by law.

Ordered, adjudged, and decreed in vacation, at Magnolia, Pike County, Mississippi, on this the 6 day of January, A. D., 1931.

R. W. Cutrer, Chancellor.

[File endorsement omitted.]

[fol. 86] IN SUPREME COURT OF MISSISSIPPI, DIVISION B

28877

HARTFORD ACCIDENT & INDEMNITY COMPANY

vs.

NATCHEZ INVESTMENT COMPANY, INC., ET AL.

OPINION—Filed Feb. 23, 1931

ETHRIDGE, P. J.:

This is the second appeal of this cause, the decision in the first appeal being reported in 155 Miss. 31, 119 So. 366, on which appeal a statement of the case as it had then developed was made. The constitutionality of Chapter 128, Laws of 1918 was upheld, and the contract between the Hartford Accident and Indemnity Company and the Natchez Investment Company, Inc. was construed and the bond held to be a bond in accordance with the provisions of Section 3, Chapter 128, Laws of 1918.

On a remand of the cause to the court below the various materialmen who had furnished material for the building, and others who had advanced money to the Natchez Investment Company, or to the contractor upon a note given by that company, propounded claims against the appellant, Hartford Accident and Indemnity Company, setting forth their claims and praying judgment for the amount thereof against the Hartford Accident and Indemnity Company and contractors, and also for interest upon the said claims and for attorneys' fees incurred in propounding and litigating their claims. A cross bill was filed against Hartford Accident & Indemnity Company and the contractors, the suit having been filed as a concursus proceeding by the Natchez Investment Company, Inc., for the benefit of all such persons, and such persons being made defendants to that bill.

Among the provisions of the contract between the contractors and the Natchez Investment Company, Inc., for the building of the hotel, was a provision stating that the owners should make payments on account of the contract, [fol. 87] as provided therein, on or about the 1st and 15th day of each month the value, based on the contract price,

of labor and materials incorporated in the work and of materials suitably stored at the site thereof up to the 1st and 15th day of each month, as estimated by the Architects, less the aggregate of previous payments. It was also provided in the contract that the contractor should furnish and pay for all materials and labor used in the construction of the building.

On the hearing in the court below agreed statements of facts were entered into between the Hartford Accident & Indemnity Company and the several materialmen whose claims were propounded in the said proceeding. These agreements are practically and substantially alike and, in effect, agree that on the 18th day of October, 1926, the Natchez Investment Company, Inc., entered into contract with J. V. and R. T. Burkes of New Orleans, Louisiana, for the construction of a hotel according to plans and specifications known as Project No. 640 of Weiss, Dreyfus and Seiferth, Inc., and that the Burkes entered upon the construction of the hotel. That the materials claimed by the several claimants were actually furnished to the Burkes, the contractors, and that the amount of them was correct, and that the prices were fair and reasonable, and the balance due, shown in the claim, was unpaid by J. V. & R. T. Burkes, and that they went into the hotel building. The agreements reserved the question as to whether an attorney's fee was due and payable to the claimants, and also whether interest was due and payable; also agreed that demand had been made upon the Natchez Investment Company for the payment of the said sums of money.

The bond of the appellant contained, among other things the following clauses:

"1. The Obligee shall, at the times and in the manner specified in the contract, fully comply with all the terms [fol. 88] thereof, and if the obligee default in the performance of any matter or thing agreed or required in this bond, or in the contract, the surety shall thereupon be relieved of all liability hereunder.

"3. If at any time there come to the notice or knowledge of the obligee information that any claim for labor performed or for materials furnished the principal in or upon the work specified in the contract remains unpaid, or that any lien or notice of lien for such work or materials has

been filed or served, the obligee shall withhold from the principal payment of any money due or to become due to the principal under the contract until the payment of such claim or discharge of such lien or notice of lien, and will so notify the surety, giving a statement of the particular facts and amount of each such claim lien or notice of lien.

"4. If any changes or alterations by the principal or obligee shall be made in the plans or specifications for the work described in the contract, the obligee shall immediately notify the surety thereof, giving a description and stating the amount of money involved by such changes or alterations. Provided, however, that should the cost of such changes or alterations in the aggregate amount to a sum equal to 10% of the penal sum of this bond, no further changes or alterations shall be made by the principal or obligee until the consent of the surety shall first be obtained thereto.

"8. None of the conditions or provisions contained in this bond shall be deemed waived or altered by the surety unless the written consent to such waiver or alteration be duly executed by its authorized officers and its seal be duly affixed thereto; nor shall the obligee consent to an assignment of the contract or any part thereof without the express consent of the surety duly executed and attested as aforesaid; nor shall this bond or any rights thereunder be assignable except with the consent of the surety duly executed and attested as aforesaid." It was also provided [fol. 89] in paragraph 7 of the bond that the surety shall not be liable unless the contract was paid in cash; and, under paragraph 11, the obligation of the surety should be construed strictly as one of suretyship only, and should not be for the benefit of any person other than the named obligee.

The contract between J. V. & R. T. Burkes, the principal in the bond, and the Natchez Investment Company, Inc. was for the price of $316,822.00, exclusive of extras, and provided that payment was to be made in current funds. The Natchez Investment Company, Inc., floated a bond issue with which to erect the building, but the proceeds thereof had to be supplemented by individual funds of the company. The bond issue netted about $280,000.00. After

the work started, and the contractors became entitled to their first estimate, instead of being paid in cash or in current funds, the contractors were given notes aggregating $38,000.00. These notes were assigned to banks and money procured from the banks by J. V. & R. T. Burkes, and the funds so obtained were used in paying for labor and material that went into the building. The notes so given were extended to them as of payment. It appears that J. V. and R. T. Burkes owed the bank, to which the $38,000.00 worth of notes was disbursed, sums of money and procured an additional credit with the bank in the sum of $15,000.00. It was understood between the Natchez Investment Company, Inc., and the contractors, J. V. and R. T. Burkes, that the giving of the notes did not extinguish the lien that the contractors had upon the building, and this seems to have also been understood by the bank to which the notes were assigned. The appellant, Hartford Accident and Indemnity Company, was not consulted about this transaction and its consent thereto was not obtained. An arrangement was also made by the Natchez Investment Company, Inc., and by the Burkes with certain other materialmen, who had sold material to the Burkes to go into the hotel building, to accept the notes of the Natchez Investment Company for the amount of their [fol. 90] claims, with an understanding that their lien would not be released against the hotel property by taking the notes of the Natchez Investment Company, the owner thereof. This arrangement was not consummated with any of the parties furnishing material except the Williamson-Greer Company, whose claim was for $12,815.10. This note was due one year after date and was dated July 1, 1927, and bore interest at 6% per annum, and provided for attorney's fees and costs incurred in collecting the same, and recited that it was secured by a lien allowed by law to the payee as to the furnishing of material, labor and supplies in the construction of the Eola Hotel of Natchez, Mississippi. This note was made payable direct to Williamson-Greer & Company by the Natchez Investment Company, Inc., and J. V. and R. T. Burkes gave credit to the Natchez Investment Company, Inc. for the amount of this note on the contract price. The notes given to J. V. and R. T. Burkes were dated November 10, 1926, one

was for $28,823.00, due February 8, 1927, or ninety days after date, and bore interest at the rate of 8% from maturity until paid, and provided for 10% additional if placed with an attorney for collection. This note contained no recital of the reserving of the lien upon the hotel property for its payment, and was a negotiable instrument. The other two notes were for $5,000.00 each, dated November 10, 1926, and due ninety days after date, and bore interest at the rate of 8%, waived protest and notice of nonpayment, and also provided that the note might be extended without notice and without affecting the liability of any parties thereto, and if the makers should fail in business or become bankrupt, or have filed against them, or any of them, proceedings in involuntary bankruptcy or for the appointment of a receiver, this note and all other debts and obligations of the maker, direct or contingent, should immediately become due and payable; and that at the maturity of the note, or when otherwise due, as provided, any and all money, stocks bonds or other securities or [fol. 91] property of any nature whatsoever on deposit with or held by, or in the possession of, said bank as collateral or otherwise, to the credit or for account of the makers, endorsers or other parties hereto, or any of them, should be and stand applied forthwith to the payment of this note, or any other indebtedness due said bank by said parties or any of them; and if this note be not paid when due and it should be placed in the hands of any attorney, that a 10% attorney's fee should be paid. These notes seem to have been made upon a blank form of the New Orleans Bank & Trust Company of New Orleans, Louisiana, to which the notes were assigned by J. V. & R. T. Burkes.

On the hearing the chancellor rendered a decree against J. V. & R. T. Burkes and T. J. Bartlette, Trustee in Bankruptcy for J. V. & R. T. Burkes, and Hartford Accident & Indemnity Company. That said bond is a bond guaranteeing the faithful performance of the contract for the erection and construction of the Eola Hotel building in Natchez, Mississippi, and the surety on the bond is liable for the payment of the respective sums set forth, and decreed to be due and owing the creditors, or claimants, set forth in the judgment adjudging the said Hartford Acci-

dent And Indemnity Company and J. V. Burkes and R. T. Burkes, jointly liable to the said creditors in the amounts due to each in the sum set forth in the decree, and adjudging interest on the said sums due on the date they were due and at 6% from the date of judgment until paid. It also adjudged a fee to the attorneys representing the Natchez Investment Company, Inc., in the concursus proceedings in the sum of $5,000.00. It refused to allow attorneys' fees to the materialmen who were brought into court and had filed cross-bills seeking to reserve their right for material, but fixed what would be a reasonable fee and made a finding of fact of what would be reasonable in each case, should the liability be adjudicated in favor of the said claimants by the judgment of this court, setting [fol. 92] out specifically the amount each claimed. It reserved in the decree the future determination of the claim propounded by N. O. Nelson Manufacturing Company, as assignee of A. W. Moore, doing business as the Acme Engineering Company, who had obtained leave of the court to intervene in the cause as defendant and cross complainant. It also reserved for future adjudication the claim of New Orleans Bank & Trust Company which had brought a proceeding in the circuit court to establish a mechanics lien on the Eola Hotel, and which cause had been transferred to the chancery court.

We are of the opinion that the provisions of the contract for the construction of the hotel and the bond, constitute a bond under Section of Chapter 128, Laws of 1918, and that the bond inures for the benefit of the materialmen who furnished the material that went into the hotel, and that the operation of this law had the effect of writing into the bond provision for the payment of claims of persons furnishing labor or material under the said contract, as though it had been actually written therein, and that none of the provisions of the bond had the effect of writing out of the contract these provisions and could not have that effect. In other words, it is not competent, where the bond is given as provided by the act, to dispense with these stipulations. All stipulations contrary to the statutory provisions must be disregarded so far as persons furnishing labor or material *or* are concerned.

We are further of the opinion that the bond did not protect the note given by the Natchez Investment Com-

pany, Inc. to the Williamson-Greer Company. Between the Natchez Investment Company, Inc., and the appellant, the Hartford Accident & Indemnity Company, the provisions that payments should be made, as provided in the contract, in cash or current funds, was made, and the statute did not prevent their insertion in the contract. When [fol. 93] the Natchez Investment Company, Inc., gave these notes instead of paying cash, and contracted to reserve the lien on the hotel for the benefit of the holders of the notes it waived its right as against the surety company as to the claims flowing from the notes. By that contract between J. V. and R. T. Burkes, and the Natchez Investment Company, Inc., the Burkes, and the assignees of the Burkes, had a negotiable instrument of value against the Natchez Investment Company, Inc., and a right to resort to the hotel building for the satisfaction of that claim, but it had no right, after making this novation, which was done without the consent of the Hartford Accident & Indemnity Company, to charge the indemnity company with the loss occasioned by the failure or bankruptcy of the Natchez Investment Company, and the bankruptcy of J. V. & R. T. Burkes. The parties accepting these notes must look to the security which they accepted in lieu of their rights under the bond against the Hartford Accident & Indemnity Company. Parties taking and accepting the notes of the Natchez Investment Company under such circumstances have no greater rights than their assignors had, and they only succeed to whatever rights the contractors would have against the Natchez Investment Company, Inc. and the hotel, had the notes not been transferred to or assigned.

We are of the opinion that the court was correct in allowing $5000.00 fees to the attorneys instituting the concursus proceeding, and that the court was also correct in denying attorney's fees to the attorneys representing claimants or materialmen who were brought in or appeared in the suit to propound their claims under the proceedings. The contract and the statute do not contemplate payment of all attorneys who may be employed, but only a reasonable attorney's fee to the attorneys representing the proceedings known as concursus proceedings. The court was also correct in allowing interest on the claim of the several claimants, such claims bore interest from the date

[fol. 94] when they were due unless there is a contract to the contrary. This rule generally prevails as to contracts, and no reason is shown as to why it should not be applied in the present case.

It follows from these views that the judgment of the could below is affirmed as to the claims of all persons, except that allowed to Walter Williamson and A. A. Greer, doing business as Williamson-Greer & Company, for $14,833.42, which is reversed and the judgment disallowed; and the petition dismissed as to all parties, except the Natchez Investment Company, Inc. Affirmed as to O. L. Bunn; the Coburn Trolley Track Manufacturing Company; Gibbons & Gordon, Inc.; Hockaday, Inc.; The R. C. Lieb Company; Natchez Drug Company; National Show Case Company; Truscon Steel Company; White Stone Company, Inc.; Woodward, Wight & Company, Ltd.; R. Lee Parker, Jr.; R. Scudamore, Jr.; R. Lee Parker, Jr., and R. Hicks Parker, doing business as Burkett Sheet Metal Works; W. A. Jacobie; St. Bernard Cypress Company; Geisenberger Bros. Drug Company; M. P. Phelan; Enochs Lumber & Manufacturing Company; Southern G. F. Company; Feltus Bros. Hardware Company; Chamberlain Metal Weather Strip Company; Ingalls Iron Works; Capitol Paint & Glass Company; Mosler Safe & Lock Company. Affirmed as to attorneys' fees allowed in concursus proceedings, and reversed as to Williamson-Greer and Company.

Affirmed except as to Williamson-Greer Company.

[File endorsement omitted.]

[fol. 95] IN SUPREME COURT OF MISSISSIPPI, DIVISION B

28877

HARTFORD ACCIDENT & INDEMNITY CO.

vs.

NATCHEZ INVESTMENT COMPANY ET AL.

JUDGMENT—Feb. 23, 1931

This cause having been submitted on a former day of this term on the record herein from the Chancery Court of

Adams County, and this court having sufficiently examined and considered the same and being of opinion that there is partial error therein, doth order, adjudge and decree that the decree of the said Chancery Court, rendered in this cause January 6th, 1930, be and the same is hereby reversed, as to the decree of the court below rendering judgment in favor of Walter Williamson and A. A. Greer, co-partners doing business as Williamson-Greer Co. of Dallas, Texas, for the sum of Fourteen Thousand, eight hundred and thirty-three and 42/100 Dollars, and said claim is hereby disallowed, and the petition of said appellee is dismissed as to all parties except the Natchez Investment Company. In all other respects the decree of said Chancery Court rendered as above stated is affirmed, both on direct and cross appeal. It is therefore, ordered, adjudged and decreed that the appellee O. L. Bunn, doing business as Bunn Electric Company, do have and recover of and from the appellant Hartford Accident & Indemnity Company, and that Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Four thousand, seven hundred and ninety-three and 97/100 Dollars, the amount of the decree in the court below, together with the further sum of Two hundred and thirty-nine and 69/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below until paid at the [fol. 96] rate of 6 percentum per annum; and

That the Coburn Trolley Track Mfg. Co., appellee, do have and recover of and from the appellant Hartford Accident and Indemnity Company and of Aetna Casualty & Surety Co., surety in the appeal bond, the sum of Three thousand, three hundred and forty-two and 76/100 Dollars, the amount of the decree in the court below, together with the further sum of one hundred and sixty-seven and 13/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said judgment from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that,

The appellee Gibbens and Gordon do have and recover of and from the appellant Hartford Accident Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Three thousand, seven hundred and fifty-five and 26/100 Dollars, the amount of the

decree in the court below, together with the further sum of One hundred, eighty seven and 76/100 Dollars, being damages at the date of 5 percentum as allowed by law, as well as interest on the amount of said judgment from date of rendition in the court below, until paid at the rate of 6 percentum per annum, and that

Hockaday Inc., appellee, do have and recover of and from the appellant Hartford Accident & Indemnity Company and of the Aetna Casualty & Surety Company, surety in the appeal bond the sum of Three thousand and thirty-seven and 39/100 Dollars the amount of the decree in the court below together with the further sum of One hundred and fifty-one and 86/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per [fol. 97] annum, and that

The R. C. Lieb Company, appellee, do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of One Thousand, three hundred and sixty-four and 12/100 Dollars, the amount of the decree in the court below together with the further sum of Sixty-eight and 21/100 Dollars being damages at the rate of 5 percentum as allowed by law as well as interest on the amount of the said decree from date of rendition in the court below, until paid at the rate of 6 percentum per annum, and that

Natchez Drug Company, appellee, do have and recover of and from the appellant, Hartford Accident and Indemnity Company, and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of One hundred and forty-three and eighty-three one hundredths dollars, the amount of the decree in the court below together with the further sum of Seven and 19/100 Dollars, being damages at the rate of 5 percentum as allowed by law as well as interest on the amount of said decree from the date of rendition in the court below until paid at the rate of 5 percentum per annum, and that

National Show Case Company, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company, and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of Four hundred

and seventy-nine and 19/100 Dollars, the amount of the decree in the court below, together with the further sum of twenty-three and 95/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

[fol. 98] Schwartz & Stewart, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company and of the Aetna Casualty & Surety Company, surety in the appeal bond, the sum of One hundred and seventy and 82/100 Dollars the amount of the decree in the court below, together with the further sum of Eight and 54/100 Dollars, being damages at the rate of 5 percentum as allowed by law as well as interest on the amount of the said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Walter C. Schultz, doing business as Schultz Cabinet Works, appellee, do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety on the appeal bond the sum of Four hundred and fifty-nine and 34/100 Dollars, the amount of the decree in the court below, together with the further sum of Twenty-two and 96/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Southern Cement Company, appellee, do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of Two thousand and twenty and 06/100 Dollars, the amount of the decree in the court below, together with the further sum of One hundred and one Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below until paid, at the rate of 6 percentum per annum, and that

[fol. 99] Truscon Steel Company, appellee do have and recover of and from the appellant Hartford Accident & Indemnity Company and of the Aetna Casualty & Surety

Company, surety in the appeal bond, the sum of Four Thousand, two hundred and twenty and 69/100 Dollars, the amount of the decree in the court below together with the further sum of Two hundred and eleven and 03/100 Dollars, being damages at the rate of 5 percentum, as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

White Stone Company, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of Five hundred and seventy-nine and 06/100 Dollars, the amount of the decree in the court below, together with the further sum of Twenty-eight and 95/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Woodward, Wight & Company, Ltd., appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company, and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of One thousand, eight hundred and forty-six 81/100 Dollars, the amount of the decree in the court below, together with the further sum of Ninety-two and 34/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

R. Lee Parker, Jr., appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Com-
[fol. 100] pany and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of Two thousand, two hundred and thirty-three and 78/100 Dollars, the amount of the decree in the court below, together with the further sum of One hundred and eleven and sixty-eight one hundredths Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid, at the rate of 6 percentum per annum, and that

S. C. Scudamore, Jr., appellee, do have and recover of and from the appellant Hartford Accident & Indemnity

Company and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of One thousand, six hundred and thirteen and 43/100 Dollars, the amount of the decree in the court below, together with the further sum of Eighty and 67/100 Dollars, being damages at the rate of 5 per-centum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

R. Lee Parker, Jr., and R. Hicks Parker, co-partners doing business as Natchez Brick Company, appellee, do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of Four thousand, five hundred and twenty-one and 29/100 Dollars the amount of the decree in the court below, together with the further sum of Two hundred and twenty-six and 06/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

[fol. 101] C. R. Burkett, doing business as Burkett Sheet Metal Works, do have and recover of and from the appellant Hartford Accident and Indemnity Company, and of Aetna Casualty Company, Surety in the appeal bond, the sum of Three thousand and thirty nine and fifty-five one hundredths Dollars, the amount of the decree in the court below, together with the further sum of One hundred and fifty-one and 97/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 5 percentum per annum, and that

W. A. Jacobie, appellee, do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Four thousand, five hundred and Thirty-seven and 54/100 Dollars, the amount of the decree in the court below, together with the further sum of Two hundred and twenty-six and 87/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below until paid, at the rate of six per centum per annum, and that

St. Bernard Cypress Company, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Three hundred and thirty-two and 80/100 Dollars, the amount of the decree in the court below, together with the further sum of Sixteen and 64/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from the date of rendition in the court below until paid, at the rate of 6 percentum per annum, and that

[fol. 102] Geisenberger Bro. Drug Company, appellee, do have and recover of and from appellant, Hartford Accident & Indemnity Company, and Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Eighty-eight and 74/100 Dollars, the amount of the decree in the court below, together with the further sum of Four and 43/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

M. T. Phelan, appellee, do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of One hundred and thirteen and 50/100 Dollars, the amount of the decree in the court below, together with the further sum of Five and 67/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 per centum per annum, and that

Enochs Lumber & Mfg. Co., appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company, and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Ten thousand and three and thirty-eight one hundredths Dollars, the amount of the decree in the court below, together with the further sum of Five hundred and Sixteen one-hundredths Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below, until paid at the rate of 6 per centum per annum, and that

Southern G. F. Company, appellee do have and recover of and from the appellant, Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of Three thousand, six hundred and seventy-two and 17/100 Dollars, the amount of the decree in the court below, together with the further [fol. 103] sum of One hundred and eighty-three and 60/100 Dollars, being damages at the rate of 5 percentum as allowed by law as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Feltus Brothers Hardware Company, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company and of Aetna Casualty Company, surety company, surety in the appeal bond, the sum of Four hundred and thirty-six and 97/100 Dollars, the amount of the decree in the court below, together with the further sum of Twenty-one and eighty-four one-hundredths Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of the said decree from date of rendition in the court below until paid, at the rate of 6 percentum per annum, and that

Chamberlain Metal Weather Strip Company, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company, and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Four hundred and seventy and 47/100 Dollars, the amount of the decree in the court below, together with the further sum of Twenty-three and fifty-two one-hundredths Dollars, being damages at the rate of 5 percentum, as allowed by law, as well as interest on the amount of said decree from the date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Ingalls Iron Works appellee do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Six hundred and thirty-eight and 58/100 Dollars, the amount of the decree in the court below, together with the further sum of Thirty-one and 97/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of

[fol. 104] said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Capital Paint & Glass Company, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company, and of Aetna Casualty & Surety Company, surety in the appeal bond the sum of Five hundred and ninety-three and 58/100 Dollars, the amount of the decree in the court below together with the further sum of Twenty-nine and 67/100 Dollars, being damages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Mosler Safe & Lock Company, appellee, do have and recover of and from the appellant, Hartford Accident & Indemnity Company and of the Aetna Casualty & Surety Company, surety in the appeal bond, the sum of Two hundred and fifty-one and 93/100 Dollars, the amount of the decree in the court below, together with the further sum of Twelve and 59/100 Dollars, being damages at the rate of 5 percentum as allowed by law, and also interest on the amount of the said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum, and that

Appellee, Natchez Investment Company, Inc., and/or I. Levy, Receiver for the Natchez Investment Company, Inc., or T. S. Sholers, Trustee in Bankruptcy for Natchez Investment Company, incorporated, for attorneys' fees for services rendered by Engle & Laub do have and recover of and from the appellant Hartford Accident & Indemnity Company and of Aetna Casualty & Suretv Company, surety in the appeal bond, the sum of Five Thousand Dollars, the amount of the decree in the court below, together with the further sum of Five hundred Dollars, being dam-[fol. 105] ages at the rate of 5 percentum as allowed by law, as well as interest on the amount of said decree from date of rendition in the court below until paid at the rate of 6 percentum per annum. It is further ordered, adjudged and decreed that the costs on appeal be apportioned as follows:

That Walter Williamson and A. A. Greer, co-partners, doing business as Williamson-Greer Company of Dallas,

Texas, and Hattie B. Laub and Gerard Brandon, sureties in the appeal bond of said appellee do pay one-fourth of the costs of this appeal to be taxed, and that the appellant, Hartford Accident & Indemnity Company and Aetna Casualty & Surety Company, surety in the appeal bond, do pay three-fourths of the costs on appeal, and that the costs in the court below be paid as directed in said decree.

[fol. 106] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

SUGGESTION OF ERROR ON BEHALF OF HARTFORD ACCIDENT & INDEMNITY CO.—Filed Mar. 21, 1931

Now comes the appellant, Hartford Accident & Indemnity Company, and suggests error in the opinion of the Court heretofore rendered in this case in the following particulars, to-wit:

1. In allowing attorney's fees to the Natchez Investment Company, Inc., in the sum of $5,000.00.

2. In affirming the judgment in favor of W. A. Jacobie.

3. In the allowance of interest on the amounts adjudged due the claimants.

4. The construction placed by the Court upon Chapter 128, Laws of 1918, is in conflict with the previous opinion of the Court in this case as reported in 155 Miss. 31, 119 So. 366, and the opinion on this appeal, as applied to the facts in this case, renders Chapter 128, Laws of 1918, unconstitutional for the following reasons:

(a). In that said opinion construing the statutes constitutes the taking of property without due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and of Section 14 of the Constitution of the State of Mississippi.

(b). In that the opinion makes a contract between persons without their consent and gives a class of persons [fol. 107] rights without the consent of the party to the contract.

(c). In that the opinion constitutes an impairment of the liberty of contract by this appellant.

(d). In that the opinion denies to this appellant the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(e). Because it is not within the police power of the State to pass such an act as the laws of 1918, as construed by this court in this opinion.

* * * * * * *

LV

We shall argue the constitutional phases together.

Upon the previous hearing of this cause, which involved the constitutionality of Chapter 128, Laws of 1918, the court pointed out that there was a vast difference between that act and Chapter 217, Laws of 1918, the public contract bond act and in discussing the impairment of the freedom of contract the Court stated and italicized that the constitutionality of the statute was saved by the provisions that the parties might write into the contract any clauses and conditions which they saw fit to insert therein. The Court pointed out that this provision of Section 3 of the act, which gave the parties full liberty of contract and permitted them to include such terms and conditions as they saw fit, saved the constitutionality of the Act even though it further provided that if such a bond were given there should be written therein protection for materialmen.

On the instant appeal the Court was met face to face with this situation: The parties had written into the contract various terms and provisions, the breach of which [fol. 108] would void the bond; the proof showed that the bond had been breached, not in one provision but in many and that proof was unchallenged and as a matter of fact came from the complainant itself and from the claimants. Therefore, there was no liability to complainant, Natchez Investment Company, Inc., the obligee of the bond, and unless the statutory provision stood on a separate footing from the contractual provisions the bond was void as to the claimants.

The opinion of the Court has ruled that the terms and provisions which the parties inserted are secondary to the statutory provisions in protecting the materialmen.

We submit that such construction renders the Act unconstitutional for the reasons detailed above. The opinion is illogical when construed with the former opinion in this case.

The instant opinion overlooked the fact that Chapter 128, Laws of 1918, in the very section which makes provision for the protection of materialmen, provides that the parties may insert all terms and conditions which they see fit and overlooks the controlling fact that this right is as much statutory as the right of materialmen created by the same section. Both rights are created by the statute, and recognized by the statute.

The statute did not provide that the right of the materialmen is prior to the rights of the parties nor that the provisions shall be separable from the provisions which the parties insert. The general rule of law is that if the contract is void as between the parties thereto it is void as to all persons claiming through it and especially is this true where the claimants are a class of third persons not named in the contract.

We are fully aware that the United States Supreme Court has ruled, in the Federal Public Contract Bond Act, that the clause for the protection of materialmen constitutes a separable contract. This is true under Chapter 217, Laws of 1918, but those statutes involve the right of the [fol. 109] sovereign to dictate its own terms and not the right of the sovereign to dictate to private parties what their contract shall be nor the right of the sovereign to say by statute that the right of one not a party to a contract shall be superior to the right of another person who makes a contract.

We contended on the first appeal that the statute was not within the police power of the state, that it did unlawfully impair the freedom of contract and the Court saved it by pointing out that the law permitted the parties to contract as they please. The Court now denies that right by the present opinion and gives to persons not parties to the contract, rights superior to those of the persons who made the contract.

In short the Court's opinion holds that the legislature may dictate and determine what the terms of the contract between parties may be, that the legislature may say that persons not parties to a contract have a higher right under it than the parties who made it, in the face of the provision of the contract that it should not inure to the benefit of any one not a party thereto.

If that is not an impairment of the freedom of contract in an unconstitutional way in violation of both the State and Federal Constitutions, if it does not constitute the taking of property without due process of law under those constitutions and if it does not deny to this appellant the equal protection of law under those constitutions, we are frank to say that we cannot conceive of a statute or of the decision which ever could be so classed.

It is respectfully submitted that the suggestion of error should be sustained, the case reversed and dismissed.

Respectfully submitted.

(Signed) Wells, Jones, Wells & Lipscomb, Attorneys for Appellant.

[File endorsement omitted.]

[fol. 110] IN SUPREME COURT OF MISSISSIPPI, DIVISION B

28877

HARTFORD ACCIDENT & INDEMNITY COMPANY

vs.

NATCHEZ INVESTMENT COMPANY, INC., et al.

OPINION ON SUGGESTION OF ERROR—Filed June 15, 1931

ETHRIDGE, P. J.:

Suggestions of error have been filed on behalf of appellant and of certain appellees which have had the individual consideration of each of the judges of this division, and after such consideration, we have decided that they should be overruled.

On behalf of the appellant, it is earnestly insisted that it was error to allow attorney's fees, that neither the stat-

ute nor the bond provided for attorney's fees, and that the allowance of the fee was, therefore, error. In the consideration of the case on the former appeal, reported in 155 Miss. p. 31, 199 So. 366, we held that when a bond is executed by a contractor in favor of the builder, which refers to a contract between the builder and the contractor, requiring the contractor to execute a bond for the faithful performance of the contract, and provides, in general terms, plans and specifications of the building to be erected and the bond, which reserved to the building company the right at its option to take over and finish the contract should the contractor fail, and other rights, such bond will be construed in connection with the contract referred to in the bond and made a part of the bond contract; and, where it is apparent from a consideration of the bond and the contract referred to that it was the intention of the bonding company, the builder, and the contractor to execute the bond required by section 3, chapter 128, Laws of 1918, it [fol. 111] will be held to be such a bond." Turning to the contract between the contractor and the owner, considered in connection with the bond, in Article 30 of the contract, it is provided:

"It shall be the ovligation of every contractor and subcontractor estimating upon work under this contract operation to figure and to include within his bid to furnish a bond in the sum and conditioned as the law of the State of Mississippi requires, in a surety company satisfactory to the Owner or Architect; contractor likewise to pay the cost of any required recordation of contract and bond and the cost of any required cancellation of the same. He shall also secure and pay for lien and privilege certificates which will be required of him before final payment is made under this contract. The bond shall also secure the Owner the faithful performance of the contract, in strict accordance with plans and specifications, it shall protect the Owner against all liens or claims that may be filed against the building according to the laws of the State of Mississippi and shall provide for the payment of reasonable attorney's fees for the enforcement of the contract and the institution of concursus proceedings, if such proceedings become necessary."

Under the contract which the bond was given to secure, the attorney's fees were provided for expressly, and it must have been within the contemplation of the parties making the bond and the parties looking to it that the bond was given to displace the materialmen's liens given by the statute under Sections 1 and 2. But it is said that there is no such proceeding in Mississippi as a concursus proceeding. The contract was drawn in Louisiana where concursus proceedings exist; and it is substantially an interpleader between all parties interested in such proceedings that they may all be brought in court at one time and all rights de- [fol. 112] termined in one suit. The proceeding here is substantially in accord with a concursus proceeding in Louisiana, and there is no error in the allowance of the attorneys' fees. The attorneys' fees appear to be large considering the function of the attorneys bringing it; but the chancellor had the matter before him with proof, and is in better position to determine the reasonableness of the amount of fees than is this court. There is no substantial merit in the contention of the appellant in the suggestion of error. The last decision, 132 So. 535, does not change the decision in 155 Miss. That opinion is referred to in the beginning of the last opinion, and the two are to be taken together. While parties have a cons-itutional right to make private contracts, and to embody in them such stipulations as they desire, yet the legislature may provide rights, under law, for materialmen and laborers which private contracts cannot displace; and where the contractor gave the bond contemplated by the contract and thus secured the benefit of displacing the liens of the materialmen, he cannot dispense with the requirements of the statute under Section 3 that the bond given shall secure the rights of the materialmen and laborers. It was, of course, optional to give the bond or leave the statute in force, but, having given the bond, the statutory conditions must remain embraced in the bond, and, as stated, before, the statute has the effect of writing the conditions in the bond therein provided. The suggestion of error on behalf of the appellant is overruled.

For the appellee, Williamson-Greer Company, it is suggested that we erred in holding that this company had waived its right under the bond. The provision of agreement relied upon, made upon the trial of the cause, to sustain this proposition reads as follows:

"That the said Williamson-Greer Company have received as security for their said claim a note of the Natchez Investment Company, Inc., for the amount of the claim, se-
[fol. 113] cured by a mortgage on the Eola Hotel and Levy Office Building at Natchez, Mississippi.

"That if it should be finally held in this cause by the Court that the bond hereinabove referred to as having been executed by the Hartford Accident & Indemnity Company as Surety on the terms and conditions as shown by the pleadings in this cause was and is a bond guaranteeing the faithful performance on the part of the said J. V. & R. T. Burkes, contractors, of their contract for the construction of said Eola Hotel Building under said Project # 640, as alleged by the pleadings in this cause and same is still in force then that the said Williamson-Greer Company is entitled to a judgment against the Hartford Accident and Indemnity Company for the full amount herein sued for and demanded as hereinabove agreed and as alleged in the cross bill of complaint filed by Williamson-Greer Company, but the Hartford Accident & Indemnity Company does not agree that they are additionally liable for interest and attorney's fees to said Williamson-Greer Company, but the question of liability for interest and attorney's fees is left to the court as a matter of legal construction under the contract documents and bond; however, it is agreed that said Williamson-Greer Company has been required to come into this proceeding as a creditor for the enforcement and protection of their rights and that it has been necessary for them to employ attorneys, to wit: Engle & Laub of Natchez, Mississippi, and that they have thereby incurred reasonable attorneys' fees for the service required and to be required in the prosecution of their claim to final judgment; and that such pro-
[fol. 114] ceedings have become necessary by reason of the failure of the contractors, J. V. & R. T. Burkes, to pay the amount of their indebtedness to the said Williamson-Greer Co."

The counsel for Williamson-Greer Company seem to give small attention to the part of the agreement "and same is still in force." The effect of the decision formerly rendered is that the Williamson-Greer Company waived its right, or was estopped to assert its right, on the bond

by reason of having taken the obligations of the Natchez Investment Company secured by lien on the hotel building. A party cannot thus deal with the bond; he could look to the bond and demand payment for the material furnished under it, but he cannot violate the terms of the bond as to what the contractor was to receive in payment, or the materialman, for the material furnished. The bond stipulated that the materialmen and contractor should be paid in money. This was an important provision for the protection of the surety on the contractor's bond. There is quite a difference in having money, which is accepted by all persons in satisfaction of all demands, and in taking a mere note and lien; and it is well known that for cash a better bargain can be secured than one on credit secured by note and lien. The Williamson-Greer Company took their security, and whether they intended to waive their right against the bond or not in doing so is not controlling. The question is,—did their conduct in so doing operate as a waiver and estoppel of their right to resort to the bond. The securities taken were not taken by the consent of the surety, and we think the Williamson-Greer Company waived its rights to resort to the bond and that it must look to the security which they took apart from the bond.

Suggestion of error overruled.

[File endorsement omitted.]

[fol. 115] In Supreme Court of Mississippi, Division B

28877

Hartford Accident & Indemnity Company

vs.

Natchez Investment Company

Order Overruling Suggestion of Error—June 15, 1931

This cause came on to be heard on suggestion of error filed herein and the court having sufficiently examined and considered the same doth order that said suggestion of error be and the same is hereby overruled.

[fol. 116] IN SUPREME COURT OF MISSISSIPPI

PETITION FOR APPEAL—Filed July 25, 1931

To the Honorable Sydney Smith, Chief Justice of the Supreme Court of the State of Mississippi:

The petition of the Hartford Accident & Indemnity Company, a corporation, respectfully shows:

1. That on the 15th day of June, 1931, in the Supreme Court of Mississippi, being the highest court of the State of Mississippi in which a decision of the suit hereinafter referred to could be had, a final judgment, adverse to petitioner, was rendered in the case in said court pending in which petitioner, said Hartford Accident & Indemnity Company was appellant and O. L. Bunn, doing business as Bunn Electric Company, The Coburn Trolley Track Mfg. Co., Gibbens & Gordon, Inc., Hockaday, Inc., The R. C. Lieb Company, Natchez Drug Company, National Show Case Company, Schwartz & Stewart, Walter C. Schultz, doing business as Schultz Cabinet Works, Southern Cement Company, Truscon Steel Company, White Stone Company, Inc., Woodward, Wight & Company, Ltd., R. Lee Parker, Jr., R. Scudamore, Jr., R. Lee Parker, Jr., and R. Hicks Parker, co-partners, doing business as Natchez Brick Company, Walter Williamson and A. A. Greer, co-partners doing business as Williamson-Greer Co. of Dallas, Texas, C. R. Burkett, doing business as Burkett Sheet Metal Works, W. A. Jacobie, St. Bernard Cypress Co., Geisenberger Bro. Drug Co., M. P. Phelan, Enochs Lumber & Mfg. Co., Southern G. F. Co., Feltus Bros. Hardware Co., Chamberlain Metal Weather Strip Co., Ingalls Iron Works, Capitol Paint & Glass Co., Mosler Safe & Lock Company, J. V. & R. T. Burkes, T. J. Bartlette, Trustee in Bankruptcy for J. V. & R. T. Burkes, a partnership, and J. V. & R. T. Burkes, individually, New Orleans Bank & Trust Company, and Natchez Investment Company, Inc., were appellees, the same being an appeal from the Chancery Court [fol. 117] of Adams County, Mississippi, in a civil suit in equity.

2. Petitioner desires that said decision be reversed, on appeal, by the Supreme Court of the United States; and

to that end files this its petition for the allowance of an appeal in said case.

3. In said case there was drawn in question the validity of a statute of the State of Mississippi, viz: Chapter 128 of the Laws of 1918, as enacted by the Legislature of the State of Mississippi at the 1918 session, which law is also found in Hemingway's Code of Mississippi, 1927, Sections 2596 to 2603, both inclusive, on the ground of its being repugnant to the Constitution of the United States and the decision in said case was in favor of the validity of said statute.

4. This petition is accompanied by an assignment of errors.

Wherefore petitioner prays the allowance of the appeal, returnable to the Supreme Court of the United States and for the issuance of citation and for a supersedeas, in conformity to the laws and rules of practice in and for such cases made and provided; and that the errors complained of may be examined and corrected and that the judgment complained of be reversed.

Arthur G. Powell, W. Calvin Wells, L. Barrett Jones, Attorneys for Petitioner, Hartford Accident & Indemnity Co.

[fol. 118] [File endorsement omitted.]

[fol. 119] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 25, 1931

Said Hartford Accident & Indemnity Company, in connection with its petition for the allowance of an appeal in said case presents this its assignment of errors and says that the decision, judgment and decree of the Supreme Court of Mississippi, rendered in said case is erroneous and unjust to the appellant in the following respects:

1. That the Supreme Court of Mississippi erred in holding and deciding that the statute of Mississippi, approved

March 28, 1918, known and designated as Chapter 128, Laws of Mississippi of 1918, (Hemingway's Code (1927) of Mississippi, Sections 2596 to 2603, both inclusive) upon which the decision against said Hartford Accident & Indemnity Company is based and upon which liability against it is predicated is not invalid as being repugnant to the Constitution of the United States, as being a law of said State which deprives persons upon whom it operates of liberty and property without due process of law.

[fol. 120] 2. That the Supreme Court of Mississippi erred in holding and deciding that Section 3 of said Statute of the State of Mississippi, as construed and applied by the Supreme Court of Mississippi, in its decision and judgment in this suit, is not repugnant to the Fourteenth Amendment to the Constitution of the United States, and, therefore, void in that it deprives the appellant of property and a property right without due process of law.

3. That the Supreme Court of Mississippi erred in holding and deciding that said statute of the State of Mississippi, and particularly Section 3 thereof, is not repugnant to the Fourteenth Amendment of the Constitution of the United States as depriving the appellant, Hartford Accident & Indemnity Company and the landowner, Natchez Investment Company, Inc., of a property right to-wit; the liberty of contract, without due process of law. To make this assignment of error more specific it is pointed out that the Supreme Court of Mississippi construed and applied said statute in this case, where the said appellant, as surety, entered into a bond with the said landowner, as obligee, providing that if said surety's principal, who was a contractor for the erection of a building for said landowner, "shall indemnify the obligee against loss or damage directly caused by the failure of the principal faithfully to perform the contract" the bond should be void and the bond further provided that it should not "apply to nor cover guarantees * * * for the furnishing of any bond" under the contract between the landowner and the contractor," and the bond further provided that "no right of action shall accrue upon or by reason hereof to or for the use or benefit of any one other than the obligee named therein," by a holding that under said statute said bond

was also subject to the additional obligation prescribed by said statute "that such contractor shall promptly make payments to all persons furnishing labor or material under said contract" and that the bond would inure to the benefit of material men and that breaches of its conditions by [fol. 121] the obligor would not be a defense by the surety against the claims of said materialmen. It is further pointed out that the Supreme Court of Mississippi thus construed and applied said statute with the effect of making it deprive said appellant and said landowner of the liberty of contracting for the indemnifying of said landowner against loss or damage directly caused by the failure of the contractor to perform the contract without also giving material men, furnishing material to the contractor, a right of action in the bond for the value of their materials furnished, despite the contractural provisions of the bond to the contrary.

4. Because the Supreme Court of Mississippi erred in affirming the judgment of the Chancellor sitting in the Chancery Court of Adams County, Mississippi, in overruling the demurrer of the Hartford Accident & Indemnity Company to the original bill in said cause; and particularly the second, fourth, fifth, sixth, eighth and ninth grounds of said demurrer which assert the repugnacy of said statute to the Constitution of the United States.

5. Because the Supreme Court of Mississippi erred in affirming the judgment and decree of the Chancellor sitting in said suit in the Chancery Court of Adams County, Mississippi and in rendering judgment and decree in favor of materialmen and against said appellant, Hartford Accident & Indemnity Company on said bond.

6. That the Supreme Court of Mississippi erred in holding and deciding that said statute of the State of Mississippi which, as construed by the Supreme Court of Mississippi, deprived the appellant, as surety on a bond, of the liberty of contracting that its liability as surety should extend only to the indemnification of the obligee (a landowner, having private work done for him), against loss or damage directly caused by the failure of the contractor faithfully to perform the contract and that no other person should have a right of action in the bond, is not void for its

repugnance to the Fourteenth Amendment to the Con-
[fol. 122] stitution of the United States.

7. That the Supreme Court of Mississippi erred in holding and deciding that the Legislature of Mississippi had the power to enact said statute under the police power of said State.

Arthur G. Powell, W. Calvin Wells, L. Barrett Jones, Attorneys for Appellant, Hartford Accident & Indemnity Company.

[File endorsement omitted.]

[fol. 123] IN SUPREME COURT OF MISSISSIPPI

ORDER GRANTING APPEAL—Filed July 25, 1931

On this the 14th day of July, 1931, the Hartford Accident & Indemnity Company, having presented its petition for the allowance of an appeal in the suit in the Supreme Court of Mississippi, in which the Hartford Accident & Indemnity Company is the appellant and O. L. Bunn, doing business as Bunn Electric Company, The Coburn Trolley Track Mfg. Co., Gibbens & Gordon, Inc., Hockaday, Inc., The R. C. Lieb Company, Natchez Drug Company, National Show Case Company, Schwartz & Stewart, Walter C. Schultz, doing business as Schultz Cabinet Works, Southern Cement Company, Truscon Steel Company, White Stone Company, Inc., Woodward, Wight & Company, Ltd., R. Lee Parker, Jr., R. Scudamore, Jr., R. Lee Parker, Jr., and R. Hicks Parker, co-partners doing business as Natchez Brick Company, Walter Williamson and A. A. Greer, co-partners doing business as Williamson-Greer Company of Dallas Texas, C. R. Burkett, doing business as Burkett Sheet Metal Works, W. A. Jacobie, St. Bernard Cypress Co., Geisenberger Bro. Drug Co., M. P. Phelan, Enochs Lumber & Mfg. Co., Southern G. F. Co., Feltus Bros. Hardware Co., Chamberlain Metal Weather Strip Co., Ingalls Iron Works, Capitol Paint & Glass Co., Moseler Safe & Lock Company, J. V. & R. T. Burkes, T. J. Bartlette, Trustee in Bankruptcy for J. V. & R. T. Burkes, a partnership, and J. V. & R. T. Burkes, individually, New Orleans Bank & Trust Company

and Natchez Investment Company, Inc., are the appellees, in which final judgment was, in said court, rendered against said appellant on the 15th day of June, 1931, in order to appeal said suit to the Supreme Court of the United States and to obtain a supersedeas of the final judgment or decree in said suit:

The petition is granted and the appeal is allowed and this shall operate as a supersedeas of the judgment or [fol. 124] decree in said suit upon said Hartford Accident & Indemnity Company giving, within the time provided by law, a bond in the sum of Ten Thousand & no/100 dollars *dollars,* payable to the adverse parties jointly and severally, conditioned that the said Hartford Accident & Indemnity Company shall prosecute its appeal to effect and answer all damages and costs if it fails to make its plea good.

Sydney Smith, Chief Justice of the Supreme Court of Mississippi.

[fol. 124a] [File endorsement omitted.]

[fols. 125 & 126] Bond on appeal for $10,000, approved and filed July 25, 1931, omitted in printing.

[fols. 127-137] Citation, in usual form, showing service on Green, Green & Jackson et al., filed July 25, 1931, omitted in printing.

[fol. 138] IN SUPREME COURT OF MISSISSIPPI

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 25, 1931

To the Clerk of the Supreme Court of Mississippi:

The Hartford Accident & Indemnity Company, the appellant in an appeal, which has been allowed by the Chief Justice of the Supreme Court of Mississippi, to the Supreme Court of the United States from the decision, judgment and decree of the Supreme Court of Mississippi in the case of Hartford Accident & Indemnity Company v. Natchez Investment Co., Inc., et al, (being numbered in said court

as No. 28 877) on appeal in said Supreme Court of Mississippi from the Chancery Court of Adams County, in which final judgment was rendered in the Supreme Court of Mississippi on June 15, 1931, files now this præcipe to indicate to you the portion of the record to be incorporated in the transcript in appeal, and to direct you to make a true transcript of the same and to certify the same as such under your hand and official seal and transmit the same within thirty days from the date hereof to the Supreme Court of the United States at Washington, D. C., viz:

(1) The bill of complaint and the exhibits "A", "B" and "C" thereto, but omitting the specifications (pages 16 to 128 of the transcript) except the following portions of said specifications (included in Exhibit "B") to-wit:

The first paragraph of the same (at top of page 17 of the transcript), under the heading "Intention";

Article 30, under heading "Guaranty Bonds" (bottom page 31 and top of page 32 of transcript);

Article 32, under heading "Liens" (page 32 of transcript);

Article 33, under heading "Assignment" (page 32 of transcript);

First and third paragraphs of Article 30, (page 41 of [fol. 139] transcript);

(2) The demurrer of Hartford Accident & Indemnity Company to the Bill of Complaint. (Pages 437 to 439 of transcript.)

(3) The decree of the Chancellor overruling the demurrers. (Page 897 of the transcript.)

(4) The opinion and judgment of the Supreme Court of Mississippi on the appeal from the Chancellor's decree overruling the demurrer.

(5) The decree rendered in the case of the Chancery Court of Adams County on January 10, 1930. (Pages 1638 to 1647 of the transcript.)

(6) The opinion and judgment of the Supreme Court of Mississippi, rendered on appeal from the final decree of the Chancery Court of Adams County.

(7) The suggestion of error filed in the Supreme Court of Mississippi to the opinion and judgment of the Supreme Court of Mississippi.

(8) The opinion and orders of the Supreme Court of Mississippi on the suggestion of error including the order overruling the suggestion of error on June 15, 1931.

This July 14, 1931.

L. Barrett Jones, Arthur G. Powell, Attorneys for Appellant, Hartford Accident & Indemnity Co.

[File endorsement omitted.]

[fol. 140] IN SUPREME COURT OF MISSISSIPPI

[Title omitted]

SUPPLEMENTAL PRÆCIPE—Filed July 29, 1931

To the Clerk of the Supreme Court of Mississippi:

St. Bernard Cypress Company, an appellee, in an appeal which has been allowed by the Chief Justice of the Supreme Court of the State of Mississippi to the Supreme Court of the United States from the decision in the case of Hartford Accident & Indemnity Company v. Natchez Investment Company, et al., (being numbered in said Court as #28,-877) on appeal in said Supreme Court of Mississippi from the Chancery Court of Adams County, Mississippi, and on which final judgment was rendered in the Supreme Court of Mississippi on June 15th, 1931, file now this præcipe to indicate to you the additional portions of the record to be incorporated in the transcript in said appeal to the United States Supreme Court and to direct you to make a true transcript of said additions and certify the same as such in the record under your hand and official seal and transmit the same within the time allowed by law from the date hereof to the Supreme Court of the United States at Washington, D. C., viz:

(1) The following parts or portions of the specifications (included in Exhibit "B" to the bill of complaint and found at pages 16 to 128 of the transcript):

Paragraph (a) at page 19 of the transcript.
Paragraph (e) on page 20 of the record.
Paragraph (g) on page 20 of the record.

Article (2)—"Execution, Correlation and Intent of Documents" found at page 20 of the record.

Article (9)—"Materials, Appliances, Employees" found at page 22 of the record.

Article (26)—"Payments Withheld" found at page 30 of the record.

[fol. 141] Third paragraph under heading "Contracts" found at page 17 of the record, also commencing with the words, "The contractor agrees, etc.," on page 34 of the record, including paragraphs (d), (e), (f), (g) and (h) through the word "sub-contractor" found on page 35 of the record.

(2) Answer and Cross bill of said St. Bernard Cypress Company found Volume I, Pages 229 to 257 of the Record, excluding the exhibits following.

(3) Amended Cross Bill St. Bernard Cypress Company, found Volume Five, page 1107.

(4) Agreed statement of facts between Hartford Accident & Indemnity Company and St. Bernard Cypress Company, found Volume Six, pages 1225 to 1228.

This July 31, A. D., 1931.

W. A. Geisenberger, By Garner W. Green, Attorneys for St. Bernard Cypress Company, an Appellee.

Certificate

I, Garner W. Green, an attorney for the above named Appellee, hereby certify that I have this day personally delivered a true copy of the above and foregoing præcipe to Hon. L. Barrett Jones, Attorney for Appellant. This July 31st, A. D., 1931.

Garner W. Green.

Received this July 31, 1931.

L. Barrett Jones.

[fol. 141a] [File endorsement omitted.]

[fol. 142] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 143] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Sept. 8, 1931.

In pursuance of Paragraph 9 of Rule 13 of the Supreme Court, the appellant, Hartford Accident and Indemnity Company, herewith files with the Clerk of the Supreme Court of the United States the statement of points on which it intends to rely and of the parts of the record which it thinks necessary for the consideration thereof, to-wit:

The appellant relies on the point that the liberty of contracting as to private business is a right protected by the 14th Amendment of the Constitution of the United States; that a statute of a state which arbitrarily denies or materially abridges this right is therefore unconstitutional and void; and, specifically, that the statute of the State of Mississippi, designated as Chapter 128 of the Laws of Mississippi of 1918 (Hemingway's Code of Mississippi, 1927, sections 2596 to 2603, inclusive) is for these reasons unconstitutional.

[fol. 144] The particular portion of the statute to which the objection of unconstitutionality especially relates, in this case, is the 3d section, which provides that "When any contractor or sub-contractor entering into any contract with any person, firm or corporation for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation, guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties may insert therein, such bond shall also be subject to the additional obligation that such contractor or sub-contractor shall promptly make payment to all persons furnishing labor or materials under said contract," and that though the bond omit this additional obligation, persons furnishing labor and material shall have a right of action on the bond to the same extent as if it were contained in the bond.

The point most seriously relied on arises under the 3d section of the Act, and under the construction given to that section by the Supreme Court of Mississippi in the present case. The bond which the landowner and the appellant, which is a surety company, agreed on in this case was carefully drawn to prevent its falling within the purview of the

Act. Its condition was not "for the faithful performance of the contract," but to "indemnify the obligee against loss or damage directly caused by the failure of the principal to perform the contract." A condition of it was that breaches of the contract by the obligee would avoid the bond. It provided against assignment of the funds due the contractor; and that on notice of any lien in favor of a materialman the funds due the contractor should be withheld by the obligee until the lien was discharged. It was provided that the bond was not to cover any provision of the contract "for the furnishing of any bond," and that no suit should be maintained on the bond by or for the use of any one except the obligee.

The point is relied on that the Supreme Court of Missis- [fol. 145] sippi in deciding that such a bond fell within the purview of the statute and that the provisions of the bond by which it was sought to deny to materialmen a right of action on it were ineffectual and that the provisions which made the bond void if the underlying contract was breached could not be used in defense against the liability arising under the statute in favor of materialmen, thereby, for the purposes of appeal to this Court, enlarged the scope of the language of the Act itself; and that its constitutionality will be tested in this Court according to the effect produced by the construction of the Supreme Court of Mississippi.

The point is, therefore, relied on that the statute deprives a landowner, contracting to have work done of a purely private nature and affected with no public use or interest, and a company engaged in the surety business of the liberty of contracting for the indemnifying of the landowner against loss directly arising from breaches of the contract by the contractor except upon the condition that the surety shall unconditionally become liable for all claims of materialmen; and that as thus construed and applied, the statute is an arbitrary and unconstitutional interference with private liberties and property rights.

The point is relied on that the statute, as construed and applied by the Supreme Court of Mississippi, cannot be upheld, as against the constitutional objection, on the ground that its enactment is within the police power of the State.

The point is relied on that the Supreme Court of Mississippi erred in affirming the judgment of the Chancellor

sitting in the Chancery Court of Adams County, Mississippi, in overruling the demurrer of the Hartford Accident & Indemnity Company to the bill of complaint, so far as relates to grounds 3, 4, 5, 6, 7, 8, 9 and 10 of the demurrer, which attack the statute stated above for repugnancy to the [fol. 146] United — Constitution, (a) because of its unwarranted interference with the freedom of contract of the owner of the property, the contractor and the surety of the contractor, (b) because it is a legislative attempt to make a contract between persons without their consent and to give to third persons rights in a contract without the consent of the contracting parties; and thereby deprives the appellant of liberty and property without due process of law and denies it the equal protection of the law.

The appellant, in filing its præcipe for transcript, has included therein only such parts of the record as are, in the judgment of its counsel, necessary to the consideration of the points set forth above. Hence the appellant designates as necessary to the consideration of these points the entire record as transmitted to this Court.

Arthur G. Powell, W. Calvin Wells, L. Barrett Jones, Attorneys for Appellant, Hartford Accident and Indemnity Company.

[fol. 147] The undersigned, as counsel of record for the following appellees: Enochs Lumber and Manufacturing Company, Ingalls Iron Works, and Capitol Paint & Glass Company, acknowledge service of the statement of points relied on and designation of parts of the record filed by the appellant as being necessary for the consideration of said points, but without recognizing that any appeal has been validly made and without prejudice to right to dismiss.

Sept 1, 1931.

Marcellus Green, Garner W. Green.

[fol. 148] The undersigned, as counsel of record for the following appellees: O. L. Bunn, doing business as Bunn Electric Company; The Coburn Trolley Track Mfg. Co.; Gibbens & Gordon, Inc.; Hockaday, Inc.; The R. C. Leib Company; Natchez Drug Company; National Show Case Company; Schwartz and Stewart; Walter C. Schultz, doing business as Schultz Cabinet Works; Southern Cement Company; Truscon Steel Company; White Stone Com-

pany, Inc.; Woodward, Wight & Company, Ltd., acknowledge service of the statement of points relied on and designation of parts of the record filed by the appellant as being necessary for the consideration of said points, but without recognizing that any appeal has been validly made and without prejudice to the right to dismiss. This September 2, 1931.

Brandon & Brandon, by G. O. H. Brandon.

[fol. 149] The undersigned, as counsel of record for the following appellees: C. R. Burkett, doing business as Burkett Sheet Metal Works, acknowledge- service of the statement of points relied on and designation of parts of the record filed by the appellant, as being necessary for the consideration of said points, but without recognizing that any appeal has been validly made and without prejudice to the right to dismiss.

E. H. Ratcliff.

[fol. 150] The undersigned, as counsel of record for the following appellees: W. A. Jacobie, Geisenberger Bro. Drug Company, and M. P. Phelan, St. Bernard Cypress Co., acknowledge service of the statement of points relied on and designation of parts of the record filed by the appellant it being necessary for the consideration of said points.

Kennedy & Geisenberger, by W. A. Geisenberger.

[fol. 151] The undersigned, as counsel of record for the following appellees: Mosler Safe and Lock Company, acknowledge- service of the statement of points relied on and designation of parts of the record filed by the appellant, it being necessary for the consideration of said points, but without recognizing that any judgment has been validly taken or validly made and without prejudice to the rights to dismiss.

Joseph E. Brown.

[fol. 152] The undersigned, as counsel of record for the following appellees: Natchez Investment Company, Inc., R. Lee Parker, Jr., and R. Hicks Parker, co-partners, doing business as Natchez Brick Company; R. Scudamore, Jr., and R. Lee Parker, Jr., acknowledge service of the statement of points relied on and designation of parts of the record filed by the appellant as being necessary for the

consideration of said points, but without recognizing that any appeal has been validly made and without prejudice to the right to dismiss.

Chas. F. Engle, S. B. Laub.

[fol. 153] The undersigned, as counsel of record for the following appellees: Southern G. F. Company; Feltus Brothers Hardware Company; Chamberlain Metal Weather Strip Company; and Capital Paint and Glass Company, acknowledge service of the statement of points relied on and designation of parts of the record filed by the appellant as being necessary for the consideration of said points.

Martin V. Byrnes, per W. C. Martin.

[fol. 154] [File endorsement omitted.]

Endorsed on cover: File No. 36,147. Mississippi Supreme Court. Term No. 333. Hartford Accident & Indemnity Company, appellant, vs. O. L. Bunn, doing business as Bunn Electric Company, et al. Filed August 29, 1931. File No. 36,147.